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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

WHITE MOUNTAIN APACHE TRIBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1960, Congress declared that a former military post in Arizona would "be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8. The question presented is whether that Act authorizes the award of money damages against the United States for alleged breach of trust in connection with such property.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-36a) is reported at 249 F.3d 1364. The opinion of the Court of Federal Claims (App., *infra*, 37a-56a) is reported at 46 Fed. Cl. 20.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2001. A petition for rehearing was denied on August 22, 2001 (App., *infra*, 58a). On November 14, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 20, 2001. On December 11, 2001, the Chief

Justice further extended the time within which to file a petition for a writ of certiorari to and including January 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Act of March 18, 1960, Pub. L. No. 86-392, 74 Stat. 8, states:

> [A]ll right, title, and interest of the United States in and to the lands, together with the improvements thereon, included in the former Fort Apache Military Reservation * * *, and subsequently set aside by [25 U.S.C. 277], as a site for the Theodore Roosevelt School, located within the boundaries of the Fort Apache Indian Reservation, Arizona, are hereby declared to be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.

2. Other pertinent statutory provisions—the Tucker Act, 28 U.S.C. 1491(a), Indian Tucker Act, 28 U.S.C. 1505, and 25 U.S.C. 277—are set forth in the appendix. App., *infra*, 59a-60a.

STATEMENT

This case concerns the threshold standard that governs in determining whether the United States is subject to suit for money damages for an alleged breach of fiduciary duty in connection with property that it holds in trust for an Indian Tribe.

1. The property at issue in this case is a former military post, Fort Apache, located within the boundaries of the Fort Apache Indian Reservation in east

central Arizona, just south of Whiteriver along Highway 73.[1] Fort Apache was established by the United States Army in 1870 and, together with the surrounding 7579 acres, was set aside by President Grant in 1877 as a military reserve. In Arizona's territorial times, Fort Apache provided a strategic outpost from which federal soldiers—aided by White Mountain Apache scouts—engaged Apache bands, including the one led by Geronimo. The Army operated the fort until 1922, when an Executive Order placed it "under the control of the Secretary of the Interior" (Secretary) for use in accordance with federal law governing the disposal of abandoned military property (Act of July 5, 1884, ch. 214, 23 Stat. 103), or as otherwise provided by Congress. See S. Rep. No. 671, *supra*, at 3; App., *infra*, 2a.

In 1923, Congress authorized the Secretary to use Fort Apache to establish the Theodore Roosevelt Indian School, provided "[t]hat the Fort Apache military post, and land appurtenant thereto, shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purposes." 25 U.S.C. 277. In the Act of March 18, 1960, Congress "declared" that Fort Apache would "be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and

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[1] The reservation was initially established by an Executive Order in 1871. In 1897, Congress set aside a smaller portion of that reservation for exclusive use by the White Mountain Apache Tribe (Tribe). Act of June 7, 1897, ch. 3, 30 Stat. 64; see S. Rep. No. 671, 86th Cong., 1st Sess. 2-3 (1959). The Tribe is organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. 476. It operates several commercial ventures, including the Hon-Dah Resort Casino, Sunrise Park Ski Resort, and various other outdoor recreational activities. See <<http://www.wmat.nsn.us>>.

improvements for administrative or school purposes for as long as they are needed for that purpose." 74 Stat. 8.[2] Since 1960, the Secretary has continued to hold Fort Apache in trust, while operating the Theodore Roosevelt Indian School. App., *infra*, 3a.

There are more than 30 buildings and other structures on Fort Apache. They include the officers' quarters, barracks, parade grounds, and stables and barns used by the cavalry that first occupied the fort; school facilities such as class rooms, dormitories, and a cafeteria; and administrative buildings such as storage and septic facilities. See App., *infra*, 3a; App. A to Compl. (listing buildings). Numerous buildings are more than a half a century old, and several date back to the fort's frontier days. Over time in the White Mountain environment, some buildings have fallen into varying states of disrepair, and a few structures have been condemned or demolished. See App., *infra*, 3a.

In 1976, portions of Fort Apache, including the Theodore Roosevelt School, were designated as a national historic site known as the Fort Apache Historic District. App., *infra*, 39a. In 1993, the Tribe

[2] In 1960, about 410 acres of Fort Apache were used for school purposes. On the approximately 7169 acres that remained, Indians had built homes and other improvements, and had used the land for "tribal grazing." S. Rep. No. 671, *supra*, at 3. In recommending passage of the 1960 Act, the Department of the Interior proposed the "subject to" clause that was subsequently enacted by Congress, explaining that that clause would reserve the right of the United States to continue to use "the property for the specified purposes." *Id.* at 2, 3. The Department further stated that "[t]his reserved right applies to any part of the land and improvements, and not merely to the lands and improvements that are presently in use. This will provide flexibility and permit modifications to be made in present administrative use without seeking new legislation." *Id.* at 4.

adopted a master plan for repairing and restoring property within the historic district. It then commissioned a 1999 survey, which concluded that re-landscaping the historic district and refurbishing its buildings and improvements in accordance with various environmental and historic preservation laws and building code provisions would cost approximately $14 million. *Id.* at 3a-4a. In addition, the Tribe has asserted that Fort Apache "has become an increasingly significant tourist attraction," and that it "has constructed a cultural museum within its boundaries." Tribe C.A. Reply Br. 3.

2. In 1999, the Tribe filed a "Complaint for Money Damages" against the United States in the Court of Federal Claims, alleging (at para. 1) that the government breached "fiduciary obligations" to the Tribe in the course of the government's "use, occupation, control, supervision, management and administration" of Fort Apache property "for administrative and school purposes." In particular, the Tribe alleged (*ibid.*) that the government "breach[ed] its fiduciary duty to maintain, protect, repair and preserve the Tribe's trust corpus." According to the complaint (at paras. 32-33), the government's asserted fiduciary duty stems from the 1960 Act, as well as from other land-use statutes and regulations.[3] The complaint (at 13) seeks $14 million in damages to repair and refurbish Fort Apache property, as well as an unspecified amount of "[c]ompensation for the economic loss and value of annual lease/rental fees."

3. The United States moved to dismiss the Tribe's complaint, arguing, *inter alia*, that under the principles

[3] The additional statutes relied upon by the Tribe include the Snyder Act, 25 U.S.C. 13; National Historic Preservation Act, 16 U.S.C. 470; Historic Sites, Buildings and Antiquities Act, 16 U.S.C. 462; and Non-Intercourse Act, 25 U.S.C. 177.

established by this Court's decisions in *United States* v. *Mitchell* (*Mitchell I*), 445 U.S. 535 (1980), and *United States* v. *Mitchell* (*Mitchell II*), 463 U.S. 206 (1983), the United States is not subject to a suit for money damages with respect to the trust property at issue, because neither the 1960 Act nor any of the other statutes or regulations relied upon by the Tribe establishes an obligation on the part of the United States with respect to such property that could give rise to a claim for money damages. The Court of Federal Claims granted the government's motion, and dismissed the complaint for failure to state a claim. App., *infra*, 37a-56a.

After reviewing the *Mitchell* decisions and lower court precedent applying them, the Court of Federal Claims stated that the dispositive inquiry in this case is whether, under the statutes or regulations identified by the Tribe, the United States owes the Tribe "any specific responsibilities with respect to the Fort Apache buildings and improvements that give rise to a money claim for breach of trust." App., *infra*, 46a. The court answered that question in the negative. The court viewed "the 1960 Act as similar to the provisions of the General Allotment Act which [were] found insufficient to establish a money-mandating claim in *Mitchell I*." *Id.* at 47a. The court further reasoned that, unlike the statutes in *Mitchell II*, "the 1960 Act does not direct the government to manage the Fort Apache site for the benefit of the Tribe." *Id.* at 48a. Instead, "[a]s the plain language indicates, the Act reserves the Fort Apache site for the federal government's benefit and not for the benefit of the Tribe." *Ibid.*

The Court of Federal Claims rejected the Tribe's argument "that, even if the statutes and regulations do not expressly create a [money-mandating] fiduciary relationship, [the United States'] day-to-day occupation, use, control, or supervision of Fort Apache under the 1960 Act" establishes such a relationship. App., *infra*, 50a. The court explained that the Tribe's argument "misconstrues * * * *Mitchell II* by focusing on the extent, rather than the nature of control necessary to establish a fiduciary relationship." *Ibid.* In that regard, the court emphasized that, although the 1960 Act "may give the government complete control over the Fort Apache site, [the Act does not] require that the government manage the Fort Apache site for the purpose of protecting the Tribe's financial interests. Indeed, the 1960 Act allows the government to manage and operate the land and buildings for its own benefit for as long as it needs them." *Id.* at 52a.

The Court of Federal Claims also rejected the Tribe's argument that it was entitled to relief under the common law doctrine of permissive waste. App., *infra*, 55a. The court explained that the Tribe failed to show that "an action for permissive waste establishes a money-mandating claim, as required under the Supreme Court's opinion in *Mitchell II*." *Ibid.* In any event, even under the common law, the court concluded, "an action for permissive waste, even if proper, does not ordinarily give rise to a money claim." *Id.* at 53a. Rather, "the appropriate remedy for permissive waste is generally an injunction," which the Tribe did not request in its self-styled "Complaint for Money Damages." *Id.* at 54a.[4]

[4] The United States also argued that the Tribe's claim was barred by the six-year statute of limitations established by 28 U.S.C. 2501. Because of its conclusion that the Tribe had failed to state a claim, the court did not reach that "alternative basis for dismissal." App., *infra*, 56a.

4. The court of appeals reversed and remanded. App., *infra*, 1a-32a. The court agreed with the Court of Federal Claims that none of the general land-use statutes or regulations relied upon by the Tribe establishes a money-mandating obligation on the part of the United States, see *id.* at 8a-10a, but it reached the opposite conclusion with respect to the 1960 Act. The court acknowledged that the 1960 Act does not "direct[] the United States to manage the trust corpus for the benefit of the beneficiaries, *i.e.*, the Native Americans," and that "the 1960 Act does not explicitly define the government's obligations" with respect to the property. *Id.* at 14a, 19a. The court nevertheless "infer[red] that the government's use of any part of the property requires the government to act in accordance with the duties of a common law trustee." *Id.* at 18a.

The court of appeals looked to "the common law of trusts, particularly as reflected in the *Restatement (Second) of Trusts*," to define the government's obligations. App., *infra*, 19a. Under the common law, the court concluded, a private trustee in the government's position "has an affirmative duty to act reasonably to preserve the trust property." *Id* at 20a. The court further determined that, under the permissive waste doctrine, the failure to perform that duty would give rise to a claim for money damages. *Id.* at 28a. In reaching that conclusion, the court found that the Tribe's interest in the property was better characterized "as an indefeasibly vested future interest" than as a "contingent future interest" (for which, the court found, damages would not be available under common law). *Id.* at 27a-28a.

The court of appeals remanded for a parcel-by-parcel determination of what trust property is in fact "under United States control," which under the court's analysis, triggers money-mandating fiduciary duties on the government's part. App., *infra*, 31a; see *id.* at 18a. In doing so, the court noted that the "record in this case is unclear as to the extent of the government's control and use of the many buildings and grounds comprising Fort Apache." *Ibid.*

Chief Judge Mayer dissented. App., *infra*, 33a-36a. In his view, under the *Mitchell* framework the key question is whether "the statutes or regulations give the government full responsibility for managing Indian resources and land for the benefit of the Indians." *Id.* at 33a. He reasoned that—just like the statute in *Mitchell I*—the 1960 Act fails to meet that test. In particular, he noted that "[n]othing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carves the government's right to unrestricted use for the specified purposes out of the trust." *Id.* at 33a-34a. Thus, Chief Judge Mayer concluded that the United States "has no fiduciary obligation to maintain the land and improvements for the Tribe that could lead to money damages," and would have affirmed the dismissal of the Tribe's complaint on that basis. *Id.* at 34a.

Chief Judge Mayer saw no need to delve into the common law to decide the threshold immunity issue. Nonetheless, he disagreed with the court's common law analysis, and would have affirmed on that "independent ground" as well. App., *infra*, 36a. He explained that under common law, "the owner of a contingent future interest has no right to sue for money damages for permissive waste," and that the Tribe held only such a contingent future interest, because its interest was subject to the "condition precedent * * * that the government no longer needs to use the property for school or administrative purposes." *Id.* at 34a, 35a.

REASONS FOR GRANTING THE PETITION

The sovereign immunity of the United States from claims for money damages is a matter of bedrock importance. The divided court of appeals' decision in this case directly contravenes this Court's precedents with respect to the statutory predicate necessary to find that the United States has agreed to subject itself to money damages for an alleged breach of trust.

The court of appeals held that the United States is accountable in money damages for an alleged breach of trust in connection with the property placed in trust by the 1960 Act, even though the court acknowledged (App., *infra*, 14a) that the 1960 Act does not obligate the United States to manage the property for the benefit of the Tribe and, in fact, the Act explicitly reserves *to the government* the right to use the property for government purposes "for as long as" (74 Stat. 8) it deems necessary. That ruling directly conflicts with this Court's *Mitchell* decisions, as well as with time-honored immunity principles. The Tribe itself recognized in the Court of Federal Claims "that to hold the government liable for money damages where the government has the right to use the trust property for its own purposes calls for an extension of *Mitchell II*." App., *infra*, 52a. Given the "substantial importance" of issues concerning "the liability of the United States" for an alleged breach of trust, *Mitchell II*, 463 U.S. at 211, certiorari is warranted to consider whether such an "extension" is proper.

Furthermore, the court of appeals' decision directs the focus of the threshold determination whether the United States may be liable to an Indian Tribe for money damages for breach of trust away from the terms of the pertinent *statute* enacted by Congress to a

case-by-case inquiry into the existence of *control* by government officials over the particular parcels of property at issue. Whenever sufficient control is evident, the decision equates the money-mandating obligations of the United States with those of a private trustee as defined by the *Restatement of Trusts*. On several different levels, that analysis is neither warranted, nor wise. In particular, that approach subjects the important immunity determination to an indeterminate fact-bound inquiry, and it contravenes the long-standing rule established by this Court's decisions that an enforceable claim to money damages must stem directly from a statute, implementing regulation, or other substantive right established by positive law.

The broad reasoning of the court of appeals could subject the United States to large money-damages claims in Indian breach-of-trust litigation, without any evidence whatsoever that Congress intended to expose the treasury of the United States to such liability. Indeed, the decision in this case already has been relied upon by the Court of Federal Claims to expose the United States to significant potential liability for alleged breach of trust in other pending Indian litigation.

A. This Case Concerns A Threshold Immunity Question Of Fundamental Importance To The United States

"It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Mitchell I*, 445 U.S. at 538 (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)); see *Mitchell II*, 463 U.S. at 212. In determining whether the United States has granted such consent, this Court has repeatedly stated that "[a] waiver of sovereign

immunity 'cannot be implied but must be unequivocally expressed.'" *Mitchell I*, 445 U.S. at 538 (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)); accord, *e.g.*, *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). That settled rule of construction applies with equal force with respect to "Indian plaintiffs." *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986).

Congress has consented to be sued on certain claims for money damages under the Tucker Act and the Indian Tucker Act. 28 U.S.C. 1491(a) and 1505. But as this Court has recognized, those statutes are merely jurisdictional. See *Mitchell II*, 463 U.S. at 212-217; see also App., *infra*, 7a-8a, 41a. They do "not create any substantive right enforceable against the United States for money damages." *Mitchell II*, 463 U.S. at 216; see *United States* v. *Testan*, 424 U.S. 392, 398 (1976). As a result, in order to state a claim for money damages against the United States that is cognizable under the Tucker Acts, a plaintiff must point to a "substantive right" stemming from some other provision of law —such as a statute or implementing regulation—that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 217. The requisite waiver of sovereign immunity exists only "[i]f a claim falls within this category." *Id.* at 218; see also *Office of Personnel Mgmt.* v. *Richmond*, 496 U.S. 414, 431 (1990).

This Court's *Mitchell* decisions rest on that foundation. In the underlying *Mitchell* litigation, the Quinault Tribe and numerous individual Indians sought damages from the United States for alleged breach of fiduciary duties with respect to timberlands on the Quinault Indian Reservation that had been allotted in trust to

individual Indians. In *Mitchell I*, the Court held that the General Allotment Act—which provides for the United States to hold allotted lands "in trust for the sole use and benefit of [Indian allotees]," 445 U.S. at 541 (quoting 25 U.S.C. 348)—did not support a money-damages action against the United States for alleged mismanagement of timber resources on allotted lands. As the Court explained, the General Allotment Act created "only a limited trust relationship between the United States and the [Tribe]." *Id.* at 542. "The Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Ibid.*

In *Mitchell II*, the Court considered a different set of statutes and implementing regulations and held that they could "fairly be interpreted as mandating compensation by the Federal Government" for mismanagement of such resources. 463 U.S. at 228. In so holding, the Court emphasized that those provisions established "'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber." *Id.* at 222; see *id.* at 221 (regulations "required the preservation of Indian forest lands in a perpetually productive state"). Distinguishing the situation in *Mitchell I*, the Court stated: "In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land *for the benefit of the Indians*." *Id.* at 224 (emphasis added); see *id.* at 226.[5]

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[5] Justice Powell, joined by then-Justice Rehnquist and Justice O'Connor, dissented in *Mitchell II*. 463 U.S. at 228-238. In their view, even the type of comprehensive statutory and regulatory scheme involved in that case—requiring the government to

Together, the *Mitchell* decisions establish important limitations on the potential liability of the United States for breach of trust with respect to property held in trust for an Indian Tribe or individual Indians.

B. The Court Of Appeals' Decision Conflicts With This Court's Precedents

The court of appeals' decision in this case directly conflicts with the *Mitchell* decisions, and fundamentally misapplies the basic principles of sovereign immunity on which those decisions rest.

1. The 1960 Act does not expressly "create any substantive right enforceable against the United States for money damages," and nothing in that Act "can fairly be interpreted as mandating compensation by the Federal Government" to the Tribe based on the government's exercise of its reserved right to use the property. *Mitchell II*, 463 U.S. at 216, 217. The Act does not give "the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." *Id.* at 224. To the contrary, as the court of appeals acknowledged, "[i]t is undisputed that the 1960 Act contains no * * * requirement" that the United States "manage the trust corpus for the benefit of the beneficiaries, *i.e.*, the Native Americans." App., *infra*, 14a. And as the court of appeals further acknowledged, "neither the 1960 Act nor any pertinent regulation sets

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manage trust property for the benefit of the Indians—failed to confer "the necessary legislative authorization of a damages remedy" against the United States, because "[n]one of [those provisions] contains any 'provision . . . that expressly makes the United States liable' for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action 'with specificity.'" *Id.* at 230 (quoting *Testan*, 424 U.S. at 399, 400).

forth clear guidelines" as to how the government is to manage the property at all. *Id.* at 18a.

At most, the 1960 Act establishes only the type of "limited trust relationship" that did not give rise to a money-mandating obligation in *Mitchell I*. 445 U.S. at 542. The Act simply "declare[s]" that "all right, title, and interest of the United States in and to [Fort Apache]" are "held by the United States in trust for the [Tribe]." 74 Stat. 8. In fact, however, the 1960 Act is an even *less* likely source of a money-mandating obligation than the statute considered by the Court in *Mitchell I*. The General Allotment Act explicitly obligates the United States to hold allotted lands "in trust for the *sole* use and benefit of the Indian [allottees]." 445 U.S. at 541 (quoting 25 U.S.C. 348) (emphasis added). The 1960 Act not only does not require the government to hold the trust property for the "sole use and benefit" of the Indian beneficiaries; it specifically reserves to the United States the right to use the property for government purposes "for as long as" it deems such use necessary. 74 Stat. 8.

As Chief Judge Mayer explained in his dissent:

> Nothing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carves the government's right to unrestricted use for the specified purposes out of the trust. Although the school is for the benefit of the Tribe, the 1960 Act expressly permits, but does not require, the government to use the fort as an Indian school. The use of the phrase "for as long as they are needed," far from expressing a fiduciary obligation, vests discretion in the Secretary of the Interior to determine how long to operate the Indian school.

App., *infra*, 34a; see also *id.* at 52a ("[T]he 1960 Act allows the government to manage and operate the land and buildings for its own benefit for as long as it needs them.") (Court of Federal Claims' decision).

Under the teaching of the *Mitchell* decisions, the provision allowing the Secretary to use the property for *government* purposes should alone have foreclosed the conclusion that the 1960 Act creates a money-mandating obligation on the part of the United States *to the Tribe*. Indeed, as noted above, the Tribe itself has acknowledged "that to hold the government liable for money damages where the government has the right to use the trust property for its own purposes calls for an extension of *Mitchell II*." App., *infra*, 52a. In addition, of course, such a holding requires an evisceration of *Mitchell I*.

2. The court of appeals believed that "control alone is sufficient to create a fiduciary relationship" that is enforceable against the United States in an action for money damages. App., *infra*, 15a. That understanding also is contradicted by the *Mitchell* decisions, especially the second one. In finding that the statutes and regulations at issue in *Mitchell II* established a money-mandating obligation on the part of the United States, the Court did point to the fact that the government had assumed "elaborate control over forests and property belonging to Indians," *i.e.*, the trust property. 463 U.S. at 225. But the Court did not state, much less hold, that such control "alone" (App., *infra*, 15a) gave rise to the money-mandating obligation. To the contrary, the Court pointed to such control only after finding that "the statutes and regulations [at issue] clearly give the Federal Government full responsibility to manage Indian resources and land *for the benefit of the Indians*." *Id.* at 224 (emphasis added).

In other words, as the Court of Federal Claims explained, the *Mitchell* inquiry is directed to "the *nature* of control"—*i.e.*, control stemming from statutes or implementing regulations that clearly obligate the United States to manage the trust property for the benefit of the Tribe—and not simply the "extent" of control *vel non*. App., *infra*, 50a (emphasis added). That understanding conforms to the Court's general immunity jurisprudence. Confining the analysis to whether the United States exercises "control" over trust property would contravene the well-established principle that to recover monetary relief from the United States, a plaintiff must identify a statute, regulation, or other source in positive law of a substantive right that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 217 (quoting *Testan*, 424 U.S. at 400).

3. The court of appeals compounded its error by holding that, since "the 1960 Act does not explicitly define the government's obligations" with respect to the trust property at issue, it was proper "to *infer* that the government's use of any part of the property requires the government to act in accordance with the duties of a common law trustee" and, further, to *infer* that such use subjects the government to the money-mandating obligations of a common law trustee. App., *infra*, 18a (emphasis added); see *id.* at 19a (because the 1960 Act "does not explicitly define the government's obligations," we "look to the common law" to define those obligations); *id.* at 31a (under common law, "the Tribe's claim gives rise to a cognizable claim for money damages"). That analysis essentially turns the settled rule on its head. The rule established by this Court's precedents is that there is *no* substantive right against

the United States for money damages unless the statute "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Testan*, 424 U.S. at 402. Under the decision below, by contrast, the government's money-mandating obligations "must be determined by the general law of trusts *as modified by the 1960 Act.*" App., *infra*, 26a (emphasis added); see *id.* at 24a.

The court of appeals believed that its approach was supported by several decisions in Indian cases in which this Court has looked to the common law of trusts. See App., *infra*, 19a (citing *Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942); *United States* v. *Mason*, 412 U.S. 391, 398 (1973); *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 121 S. Ct. 1060, 1068 (2001)). In those cases, however, the Court considered the common law in evaluating the scope of the United States' duties in circumstances in which it was understood that the United States had assumed trust duties under a provision of positive law with respect to the particular matter at issue, and not—as the court of appeals did here—to impose a money-mandating obligation on the part of the United States that had no grounding in a statute, implementing regulation, or treaty.[6] It is one thing to say that the United States,

[6] The money claims in *Seminole Nation* were predicated on alleged violations of express promises by the United States in treaties or statutes to pay sums certain to the Tribe. 316 U.S. at 293-294. In *Mason*, the Court found no breach of any fiduciary obligation on the part of the United States, and thus had no occasion to consider the circumstances in which the United States may be held to have waived its immunity from suit for money damages for breach of trust. 412 U.S. at 400. And *Klamath Water Users* did not even involve a claim for money damages for breach of trust, but instead a claim for *documents* under the Freedom of Information Act. See 121 S. Ct. at 1064. Cf. *United States* v. *Creek Nation*, 295 U.S. 103, 109 (1935) (money claims involving alleged misappropriation of property that the United States gave to Tribe by treaty in "fee simple").

when acting as trustee for an Indian Tribe, may assume certain duties that are analogous to those recognized at common law between private trustee and beneficiaries. See *Nevada* v. *United States*, 463 U.S. 110, 127 (1983). It is quite another to say that simply by entering a generalized trust relationship with an Indian Tribe, or by passing a statute providing that certain property will be held in trust, Congress has created a cause of action against the United States for money damages for all obligations that would apply to a private trustee.

The *Mitchell* decisions prove the point. In *Mitchell I*, this Court rejected the argument that the plaintiffs were entitled to money damages to compensate for the alleged breach of trust simply "because that remedy is available in the ordinary situation in which a trustee has violated a fiduciary duty and because without money damages [plaintiffs] would have no effective redress for breaches of trust." 445 U.S. at 541-542. In *Mitchell II*, the Court stated that "the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." 463 U.S. at 226.[7] But the Court explicitly

[7] For support, the Court referred in a footnote to its decisions in *Seminole Nation* and *Creek Nation* (as well as certain lower court decisions). See 463 U.S. at 226 n.31. The Tribe's claim for money damages in each of those cases, however, was specifically based on the violation of a *substantive right* granted by the United States in a treaty or statute, and not on violation of mere common law duties. See note 6, *supra*.

grounded its finding of a money-mandating obligation for breach of the particular trust duties spelled out in the statutes and implementing regulations relied upon by the Tribe. See *id.* at 228 ("We thus conclude that the statutes and regulations at issue here can fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property."); see *id.* at 226.[8]

The United States occupies a unique relationship with the Indian Tribes that has long been characterized as one of "guardianship" or "trust." See *United States* v. *Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The United States fully accepts the implications of that relationship and the undertakings that go with it. Not all those undertakings, however—such as the operation of a school for Indian children—give rise to legally enforceable *duties* on the part of the United States, much less duties that are enforceable in a suit for money damages. In determining when an alleged breach of those duties may give rise to a suit for money damages, this Court has invoked the same principles that govern the determination whether the United States is immune from money-damages actions in other contexts. See *Mitchell II*, 463 U.S. at 218-219; *Mitchell I*, 445 U.S. at 538; see also *Mottaz*, 476 U.S. at 851; *Klamath & Moadoc Tribes of Indians* v. *United States*,

[8] In a similar vein, this Court in *Nordic Village*, 503 U.S. at 39, refused to "[r]esort to the principles of trust law" to find that the United States had waived its immunity from a bankruptcy trustee's claims for money damages, and specifically indicated that "trust decisions" involving private entities "are irrelevant" when it comes to determining the liability of the *government*.

296 U.S. 244, 250, 255 (1935); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903). To the extent that the court of appeals' decision puts the United States in the shoes of a private, common law trustee for purposes of determining whether it has assumed money-mandating obligations to an Indian Tribe, that decision departs significantly from this Court's precedents.

4. The decision below conflicts with this Court's sovereign immunity jurisprudence in another crucial respect. This Court has recognized the need for clear and predictable rules in the area of sovereign immunity. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas, * * * the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."). The analysis adopted by the court of appeals below could scarcely be more at odds with that objective. Under the court's decision, the potential liability of the United States for millions of dollars in damages for alleged breach of trust ultimately turns *not* on the terms of the pertinent statutes or regulations, but instead on whether the Tribe's interest in the Fort Apache property is better characterized as a "contingent future interest" or an "indefeasibly vested future interest," an arcane issue on which the panel itself split. App., *infra*, 27a-28a; see *id.* at 35a-36a (dissent).[9]

[9] Chief Judge Mayer correctly resolved this issue. See App., *infra*, 34a-36a. But to be clear, in deciding whether the United States is immune from the Tribe's money-damages claims, there should be no need for this Court to plumb that issue because—consistent with the *Mitchell* decisions and other precedents discussed above—the key issue is whether the statutes or regulations on which the Tribe's claims are based "can fairly be interpreted as

Furthermore, under the court's "control" rule, the United States faces (common law) money-mandating obligations "only as to the specific parcels of trust property that the federal government has used and controlled" and—the court cryptically added—"possibly the grounds immediately surrounding such parcels." App., *infra*, 18a. As a result, the determination whether (or to what extent) the government is liable for breach of trust hinges on a fact-intensive, parcel-by-parcel inquiry into "the extent that the federal government has * * * used buildings to the exclusion of the Tribe." *Ibid.* That is a highly amorphous inquiry on which to base the liability of a sovereign for money damages. More to the point, there is no evidence on the face of the 1960 Act (or any other statute or regulation cited by the Tribe) that Congress intended to expose the United States to mandatory liability in that haphazard manner. The proper approach—and the one that this Court's own precedents establish—grounds the determination whether the United States is immune from money damages on the terms of the statutes or regulations on which the damages claim is based.[10]

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mandating compensation by the Federal Government for damages sustained." *Mitchell II*, 463 U.S. at 226.

[10] Because damages actions against the United States are confined by the Tucker Act and Indian Tucker Act to the Court of Federal Claims, the basic sovereign immunity issue presented is unlikely to arise in other circuits. The court of appeals' decision in this case represents a significant doctrinal development in the Federal Circuit's own decisions in this important area. In prior cases, the Federal Circuit has recognized that, in order to give rise to a claim for money damages, a money-mandating duty must "spring[] from the statutes and regulations which 'define the contours of the United States' fiduciary responsibilities.'" *Pawnee* v. *United States*, 830 F.2d 187, 192 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1988); see *id.* at 190 (grounding money-mandating obligation in "statutes and regulations [that] (a) give elaborate powers to Interior with respect to [oil and gas] leases, (b) always call for consideration of the best interests of the Indians, (c) require proceeds of the leases to be given to the Indians and, (d) recognize the existence of a general trust relationship toward the Indians with respect to the oil and gas products of these lands"); see also *Brown* v. *United States*, 86 F.3d 1554, 1562 (Fed. Cir. 1996) (grounding money-mandating duty in statutes and regulations that "make it clear beyond any doubt that the Secretary exercises his or her control over commercial leasing on allotted lands not only for traditional general welfare purposes * * * but also for the purpose of protecting [Indian] allottees' financial interests"). Chief Judge Mayer dissented in *Brown*, and argued that the statutes and regulations relied upon by the court in that case were insufficient —compared against those in *Mitchell II*—to give rise to a money-mandating obligation on the part of the United States. See *id.* at 1564-1565. In this case, the court of appeals essentially divorced the immunity inquiry from the terms of the pertinent statutes and regulations and, instead, tied it to judge-made principles of common law and notions of federal control over trust property.

C. The Court Of Appeals' Decision Can Be Expected To Have Serious Adverse Consequences For The Government

The potential fiscal and programmatic implications of the court of appeals' decision are significant. The Tribe's damages claim in this case alone totals $14 million, plus unspecified damages for economic loss. The decision below will encourage the filing of additional damages claims against the United States for breach of trust with respect to Indian trust property, or buildings on such property. The United States holds more than 56 million acres of land in trust for individual Indians or Indian Tribes. A significant portion of that land, including allotments, is held in a limited or bare trust. The decision in this case could prompt money-damages claims for breach of trust with respect to such

property, even though such claims would otherwise be barred under a proper understanding of this Court's *Mitchell* decisions.

Furthermore, the broad reasoning of the court of appeals' decision in this case already has spilled over into other types of Indian breach-of-trust litigation. For example, in *Navajo Nation* v. *United States*, 263 F.3d 1325 (2001), the Federal Circuit held that the United States is subject to money damages for an alleged breach of trust in approving an Indian mineral lease. In so holding, the court of appeals specifically stated that, in *White Mountain Apache*, "we found an enforceable fiduciary relationship between the White Mountain Apache Tribe and the government whose breach could give rise to a claim for money damages" even though, as the court recognized, the statute here does not impose any fiduciary obligations on the United States to manage the land on behalf of the Tribe. *Id.* at 1335; see *id.* at 1329-1330 ("Although the statute [in *White Mountain Apache*] was silent on how the United States was to administer the property, the court applied the common law of trusts to hold that the United States had a trustee's duty to preserve the trust corpus, despite the absence of a specific statute and regulations."); *id.* at 1335 (In *White Mountain Apache*, "we determined the government's obligations * * * [by] looking to the common law of trusts.").[11]

[11] Judge Schall dissented in part in *Navajo Nation*. He agreed with the court that the statutes and regulations governing Indian mineral leasing gave rise to a "general fiduciary relationship between the [Navajo] Nation and the government regarding coal leases." 263 F.3d at 1339. But he took the position that to state a claim for money damages for breach of such relationship, the Tribe was required to "show the breach of a *specific* fiduciary obligation that falls within the contours of the statutes and regulations that create the general fiduciary relationship." *Id.* at 1341 (emphasis added). The Tribe here could not possibly make such a showing; it is undisputed that "neither the 1960 Act nor any pertinent regulation sets forth clear guidelines as to how the government must manage the trust property." App., *infra*, 18a.

The Court of Federal Claims already has applied the decision in this case as well. See *Shoshone Indian Tribe of the Wind River Reservation* v. *United States*, 51 Fed. Cl. 60, 68 (2001) ("In *White Mountain Apache Tribe*, the Federal Circuit applied the common law of trusts to hold that the United States had a trustee's duty to preserve the trust corpus, *despite absence of specific statutory or regulatory language regarding a fiduciary relationship.*") (emphasis added).

In short, the decision below—which departs sharply from this Court's *Mitchell* decisions—is taking root, and the rapid speed with which it already has spread underscores that the basic question presented is of an important and recurring nature. As the court of appeals recognized in this case, "[t]he Supreme Court has not provided further guidance in this area since the 1983 decision in *Mitchell II*." App., *infra*, 13a. Such guidance is now needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 00-5044

WHITE MOUNTAIN APACHE TRIBE,
PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Decided: May 16, 2001
Rehearing and Rehearing En Banc
Denied Aug. 22, 2001

Before: MAYER, Chief Judge, MICHEL and DYK, Circuit Judges.

Opinion for the court filed by Circuit Judge DYK. Dissenting Opinion filed by Chief Judge MAYER.

DECISION

DYK, Circuit Judge.

This case presents the question of whether a 1960 Act of Congress, Pub. L. No. 86-392, 74 Stat. 8 (1960) (the "1960 Act"), obligates the United States to maintain or restore certain property and buildings held by the United States in trust for the White Mountain

Apache Tribe (the "Tribe")[1] so that the Tribe can maintain a suit for damages in the Court of Federal Claims. We hold that it does, though the obligation created is narrower than that claimed by the Tribe. We accordingly reverse and remand the decision of the Court of Federal Claims in *White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20 (1999), for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

In 1870, the United States Army established a military post known as "Fort Apache" on approximately 7,500 acres of land within the borders of what later became the White Mountain Apache Tribe's reservation in Arizona.[2] The Army operated Fort Apache as a military post until 1922, when Congress transferred control of the Fort to the Secretary of the Interior, and designated approximately 400 acres of the Fort for use as a boarding school for Native American children to fulfill certain unspecified treaty obligations of the United States. See 25 U.S.C. § 277 (1994).[3]

In 1960, Congress passed the 1960 Act which declared the Fort to be "held by the United States in

[1] The Tribe is a federally recognized Native American tribe organized under section 16 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 476.

[2] The Tribe's reservation was established by an Act of Congress on June 7, 1897. 30 Stat. 62, 64 (1897).

[3] That statute provided that "[t]he Secretary of the Interior is authorized to establish and maintain the former Fort Apache military post as an Indian boarding school for the purpose of carrying out treaty obligations, to be known as the Theodore Roosevelt Indian School: Provided, That the Fort Apache military post, and land appurtenant thereto, shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purposes." 25 U.S.C. § 277.

trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." Pub. L. No. 86-392, 74 Stat. 8 (1960). Pursuant to that statute, the government allegedly controls and has the ability to use approximately thirty-five buildings on the site. The Court of Federal Claims found, and the parties do not dispute, that a small number of students are currently enrolled in the school, and that "the future of the school as a viable institution is apparently under review." *White Mountain Apache Tribe*, 46 Fed. Cl. at 22 n.2. According to the parties, the government has offered to terminate its trusteeship over an unspecified number of the buildings and to transfer control of them to the Tribe. The Tribe, however, has refused to accept that offer unless and until the government rehabilitates the buildings. The record does not reveal whether the United States has turned over any of the buildings to the Tribe.

At issue in this appeal is the government's obligation as trustee to maintain and restore those buildings, which include, *inter alia*, barracks constructed by the United States Army, the Native American boarding school and student dormitories, and various administrative buildings constructed by the Department of the Interior.

According to the Tribe, the government has had exclusive access to and control over those buildings and has allowed many of them to fall into disrepair. The Tribe alleges, and the government does not dispute, that the Department of the Interior has condemned and demolished several buildings deemed to be unsafe. The Tribe contends that it has repeatedly requested, to no

avail, that the Secretary of the Interior and the Bureau of Indian Affairs maintain and restore the trust property. In May of 1993, the Tribe adopted a "master plan"[4] for the preservation and restoration of the Fort. In November of 1998, the Tribe commissioned an assessment of the trust property and obtained cost estimates for the repair and preservation of the buildings. According to that report, as of 1999, the total cost to rehabilitate the buildings amounted to approximately $14 million dollars. The government responds that it has indeed maintained and restored some of the thirty-five buildings, but acknowledges that others are dilapidated.[5]

On March 19, 1999, the Tribe commenced a breach of trust action in the Court of Federal Claims seeking $14 million dollars in damages for the government's alleged breach of "its fiduciary duty to maintain, protect, repair and preserve the Tribe's trust corpus." The Tribe alleged that its claim arose under the 1960 Act, as well as the Snyder Act (codified at 25 U.S.C. § 13), the National Historic Preservation Act of 1966 (codified at 16 U.S.C. § 470 *et seq.*) and a variety of other federal statutes and regulations.

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[4] The Tribe does not define the phrase "master plan." The Tribe's complaint merely provides, in pertinent part, that in 1993, "the Tribe declared its intent to intervene and save its imperiled trust property and adopted a Master Plan to protect, preserve, maintain, repair, rehabilitate and restore said property within the Historic District as a cultural and economic resource for the Tribe."

[5] We note that in 1976, the National Park Service designated the Fort as a National Historic Site, and that in September 1997, the World Monuments Watch placed the Fort on the "1998 List of 100 Most Endangered Monuments." *White Mountain Apache Tribe*, 46 Fed. Cl. at 22.

The government filed a motion to dismiss for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction. In that motion, the government argued that neither the 1960 Act, nor any of the other statutes and regulations cited by the Tribe, imposed an obligation on the United States to maintain or restore the buildings held in trust for the Tribe, and that the Tribe had not stated a cognizable claim for money damages for the government's alleged mismanagement of that trust property. In addition, the government contended that the Tribe's breach of trust claim, even if otherwise valid, accrued outside the six-year statute of limitations period governing claims brought against the United States under 28 U.S.C. §§ 1491 and 1505.

The Court of Federal Claims agreed with the government that the Tribe had failed to prove the existence of a fiduciary obligation on the part of the United States that would, if breached, give rise to a claim for money damages, and dismissed the complaint for failure to state a claim. In reaching that decision, the court relied on two Supreme Court cases which establish the principles governing breach of trust claims by Native Americans against the United States, *United States v. Mitchell*, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) ("*Mitchell I*"), and *United States v. Mitchell*, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) ("*Mitchell II*").[6] The Court of Federal Claims found that the language of the 1960 Act "creates a limited, or bare trust relationship between the government and the Tribe," akin to the trust relationship created by the General Allotment Act of 1887, 24 Stat.

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[6] The *Mitchell* cases are discussed in detail in part IV of this opinion, *infra*.

388, codified at 25 U.S.C. § 331 *et seq.*, which was found in *Mitchell I* not to impose fiduciary duties on the United States. *White Mountain Apache Tribe*, 46 Fed. Cl. at 26. The court further noted that unlike the statutes and regulations found to create fiduciary duties in *Mitchell II*, the 1960 Act "does not direct the government to manage the Fort Apache site for the benefit of the Tribe." *Id.* at 26.

The court also rejected the Tribe's argument that, even if the government had no fiduciary obligation to maintain the property for the benefit of the Tribe, the government was liable for its failure to prevent deterioration of the property under a "permissive waste" theory, by analogy to property law. (Under this theory, as articulated by the Tribe, the United States, as the current tenant of the trust property, would be required to take reasonable steps to prevent deterioration of the property in anticipation of its transfer to the Tribe.) The court disagreed, noting that "the difficulty with plaintiff's argument is that an action for permissive waste, even if proper, does not ordinarily give rise to a money claim." *Id.* at 28. Referencing a secondary source that summarized sections 188, 189 and 195 of the *Restatement (First) of Property* (1936), the court observed that "[t]he law on 'permissive waste' provides that the appropriate remedy for permissive waste is generally an injunction," an equitable remedy that the Court of Federal Claims lacks jurisdiction to award. *Id.* *But cf. Bobula v. United States Dep't of Justice*, 970 F.2d 854, 858 (Fed. Cir. 1992) (noting that equitable relief is sometimes available in a suit brought under the Tucker Act, 28 U.S.C. § 1491, when that relief "is incidental to and collateral to a claim for money damages"). In short, the court concluded that it lacked

jurisdiction over the Tribe's claim and accordingly dismissed the action for failure to state a claim upon which relief may be granted. The court did not reach the government's statute of limitations argument. This timely appeal followed.

DISCUSSION

I

The question before us is whether the Court of Federal Claims erred in dismissing this breach of trust claim against the United States for failure to state a claim upon which relief may be granted. We review that decision without deference. *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1286-87 (Fed. Cir. 1999). We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3) (1994).

II

The Tucker Act gives the Court of Federal Claims jurisdiction over broad categories of claims against the United States and constitutes a waiver of sovereign immunity as to those claims. 28 U.S.C. § 1491 (1994); *Mitchell II*, 463 U.S. at 212, 103 S.Ct. 2961. A companion statute, the Indian Tucker Act, further confers jurisdiction on the Court of Federal Claims to hear any claim brought by a Native American tribe against the United States that "is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe." 28 U.S.C. § 1505. Although the Tribe premised jurisdiction in the Court of Federal Claims upon both statutes, it is § 1505 that primarily confers jurisdiction over this action.

However, it is axiomatic that these two statutes are merely jurisdictional and do not create "any substantive right enforceable against the United States for

money damages." *Mitchell II*, 463 U.S. at 216, 103 S. Ct. 2961 (discussing the Tucker Act); *Mitchell I*, 445 U.S. at 540, 100 S.Ct. 1349 ("It follows that 28 U.S.C. § 1505 no more confers a substantive right against the United States to recover money damages than does 28 U.S.C. § 1491."). Thus, in order to state a claim, the Tribe must point to some other source of law, such as "the Constitution, or any Act of Congress or any regulation of an executive department" that imposes an obligation on the United States to repair and preserve the Tribe's trust property. 28 U.S.C. § 1491(a)(1). The Tribe must also demonstrate that the source of law relied upon "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Mitchell II*, 463 U.S. at 217, 103 S. Ct. 2961 (quoting *United States v. Testan*, 424 U.S. 392, 400, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976)).

III

Before the Court of Federal Claims and on this appeal, the Tribe argued that a variety of statutes and regulations, other than the 1960 Act, impose fiduciary obligations upon the United States. We disagree.

The Snyder Act governs the general appropriations of the Bureau of Indian Affairs ("BIA"). It provides, in pertinent part, that the BIA "shall direct, supervise, and expend such monies as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes: . . . For industrial assistance and advancement *and general administration of Indian property*. . . . For the enlargement, extension, improvement, *and repair of the buildings and grounds of existing plants and projects*." 25 U.S.C. § 13 (emphases added). We agree with the Court of Federal Claims

that this statute fails "to provide a basis for a money-mandating claim as laid out in *Mitchell II*." *White Mountain Apache Tribe*, 46 Fed. Cl. at 26. Indeed, in *Lincoln v. Vigil*, 508 U.S. 182, 194, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993), the Supreme Court held that the "general terms" of the Snyder Act do not require expenditure of general appropriations on specific programs for particular classes of Native Americans. *See also Vigil v. Andrus*, 667 F.2d 931, 934 (10th Cir. 1982) (holding that language of the Act is "too broad to support a conclusion that Congress has expressly appropriated funds for lunches for all Indian school children").

While other statutes or regulations relied on by the Tribe may impose obligations on federal agencies, none of these statutes or regulations imposes fiduciary obligations that would lead to a claim for money damages. *See* the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.* (requiring federal agencies to manage and maintain historic properties under their control); the Historic Sites, Buildings, Objects, and Antiquities Act of 1935, 16 U.S.C. § 462(f) (requiring Secretary of the Interior, *inter alia*, to "[r]estore, reconstruct, rehabilitate, preserve and maintain" any historic or prehistoric buildings or property); Title XI of the Education Amendments Act of 1978, 25 U.S.C. § 2005 (requiring the Secretary of the Interior to bring "all schools, dormitories, and other facilities" operated by the Bureau of Indian Affairs "into compliance with all applicable Federal, tribal, or State health and safety standards"); the Improving America's Schools Act of 1994, 25 C.F.R. § 32.4(s)(2) (requiring federal government to "[m]aintain all school and residential facilities to meet appropriate Tribal, State or Federal safety, health and child care standards"); 25 U.S.C.

§ 177 (precluding conveyance of Native American lands without United States' approval); the American Indian Trust Fund Management Act of 1994, 25 U.S.C. § 4043(c)(5)(C)(ii) (requiring Special Trustee for Native Americans to certify that the Department of the Interior's budget requests to Congress are adequate to "discharge, effectively and efficiently, the Secretary's trust responsibilities" to Native Americans). Thus we find that none of these statutes or regulations "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained," *Mitchell II*, 463 U.S. at 216-17, 103 S. Ct. 2961, to the trust property.

Accordingly, we turn our attention to the 1960 Act.

IV

As noted earlier, the 1960 Act provides, in pertinent part, that certain lands and improvements thereon shall "be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use" the property "for administrative or school purposes." Pub. L. No. 86-392, 74 Stat. 8 (1960).

Both the Tribe and the United States in their briefs agree that the 1960 Act creates a "trust."[7] The statute itself states that the land and "improvements thereon" are held "in trust" for the Tribe. Moreover, it is well-established that a common law trust arises when three elements are present, namely, a trustee, a beneficiary, and a trust corpus. *Restatement (Second) of Trusts* § 2

[7] Inexplicably, at oral argument the government reversed its position by arguing that a beneficial interest in the property had not yet passed to the Tribe. But for the reasons stated in the text, we find that the 1960 Act creates a "trust."

cmt. h (1959); *see also Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961; *Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583, 589 (10th Cir. 1992) (listing elements of common-law trust), *cert. denied*, 507 U.S. 1003, 113 S. Ct. 1642, 123 L. Ed. 2d 265 (1993). In this case, all of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Tribe) and a trust corpus (the land and buildings held in trust).

However, the mere fact that the 1960 Act creates a trust relationship does not end the inquiry. We must also determine whether there is a fiduciary obligation created by the 1960 Act or merely a "bare trust." *Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961. If there is no fiduciary obligation, then there is no claim for money damages for the alleged breach of that obligation.

In *Mitchell I*, the Supreme Court held that federal statutes and regulations that create only a "limited trust relationship" between the United States and Native American tribes do not impose fiduciary obligations that give rise to claims for money damages. 445 U.S. at 542, 100 S. Ct. 1349. The statute at issue in that case, the General Allotment Act of 1887 (codified at 25 U.S.C. § 331 *et seq.*), provided in pertinent part that the United States was to "hold the land thus allotted . . . in trust for the sole use and benefit of the Indian to whom such allotment shall have been made." 445 U.S. at 541, 100 S. Ct. 1349. Relying on that statute, individual Native American allottees sued the United States for alleged breach of its fiduciary duty to properly manage certain timber resources (located on the reservation) for the production of income. One of our predecessor courts, the Court of Claims, denied the United States' motion to dismiss the action, reasoning that the plain language of the statute created a general

fiduciary duty enforceable against the United States by means of a claim for money damages. The Supreme Court disagreed, holding that the language of the statute, when understood in light of the legislative history, "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." *Id.* at 542, 100 S. Ct. 1349. The Court concluded that "[a]ny right of the respondents [allottees] to recover money damages for Government mismanagement of timber resources must be found in some source other than" the General Allotment Act. *Id.* at 546, 100 S. Ct. 1349. The Court noted that the "Court of Claims did not consider the respondents' [allottees'] assertion that other statutes . . . render the United States liable in money damages for the mismanagement alleged in this case," *id.* at 546 n.7, 100 S. Ct. 1349, and accordingly remanded the case for consideration of these alternative statutory bases for the United States' liability. *Id.* at 546, 100 S. Ct. 1349.

On remand, the Court of Claims found that the statutes relied upon by the allottees other than the General Allotment Act—conferring responsibility on the federal government for timber management on Indian lands, roadbuilding and the granting of right-of-way over those lands, and trust fund management[8] —created a trust relationship sufficient to ground a claim for money damages under the Tucker Act.

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[8] Those statutes involved, inter alia, timber management on Native American lands (25 U.S.C. §§ 406, 407, 466), roadbuilding on and rights-of-way over those lands (25 U.S.C. §§ 318, 323-325), and the administration of funds held in trust for Native American trusts (25 U.S.C. § 162a). *Mitchell v. United States*, 229 Ct. Cl. 1, 664 F.2d 265, 269-274 (Ct. Cl. 1981) (en banc).

Mitchell v. United States, 229 Ct. Cl. 1, 664 F.2d 265, 269 (Ct. Cl. 1981) (en banc). The Court of Claims accordingly denied the government's motion to dismiss the action.

In *Mitchell II*, the Supreme Court agreed that the allottees had properly stated a claim against the United States for breach of trust, reasoning that:

> In *[Mitchell I]*, this Court recognized that the General Allotment Act creates a trust relationship between the United States and Indian allottees but concluded that the trust relationship was limited. . . . *In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians.* They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.

Mitchell II, 463 U.S. at 224, 103 S. Ct. 1261 (emphasis added). In reaching this conclusion, the Court first noted (with regard to the timber management statutes) that "[v]irtually every stage of the process is under federal control," and that "[t]he Department [of the Interior] exercises comparable control over grants of rights-of-way on Indian lands held in trust." *Id.* at 222-23, 103 S. Ct. 2961. The Court further observed that "[t]he language of these statutory and regulatory provisions directly supports the existence of a fiduciary relationship." *Id.* at 224, 103 S. Ct. 2961.

The Supreme Court has not provided further guidance in this area since the 1983 decision in *Mitchell II*, though a number of lower court decisions, including

decisions of this court, have applied the holdings of the *Mitchell* cases in other statutory contexts. For example, in *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032, 108 S. Ct. 2014, 100 L. Ed. 2d 602 (1988), this court concluded that the Indian Long Term Leasing Act, 25 U.S.C. § 396, and the Federal Oil and Gas Royalty Management Act, 30 U.S.C. §§ 1701-1757, "give elaborate powers to Interior with respect to" oil and gas leases on mineral lands held in trust for the Native Americans. *Id.* at 190. Relying on *Mitchell II*, we accordingly held that those statutes imposed fiduciary obligations on the United States. *Id.*; *see also Brown v. United States*, 86 F.3d 1554, 1563 (Fed. Cir. 1996) (concluding that "the commercial leasing regime created for [Native American] trust lands in 25 U.S.C. § 415(a) and 25 C.F.R. part 162 imposes general fiduciary duties on the government in its dealings with the Indian allottee-lessors"); *Short v. United States*, 50 F.3d 994, 998 (Fed. Cir. 1995) (holding that certain federal statutes providing for the payment of interest on tribal trust funds held by the United States, "in conjunction with the government's fiduciary duty to Native American tribes, give the plaintiffs a substantive right to damages, including interest" for breach of that duty) (citing *Mitchell II*, 463 U.S. at 224-26, 103 S. Ct. 2961).

On this appeal, the government urges that the *Mitchell* cases, read together, impose a fiduciary obligation only when the pertinent statute or other authorizing document creating the trust relationship also directs the United States to manage the trust corpus for the benefit of the beneficiaries, *i.e.*, the Native Americans. It is undisputed that the 1960 Act contains no such requirement, and the government

accordingly argues that the statute cannot serve as a basis for the imposition of fiduciary obligations on the United States. We do not agree.

To be sure, *Mitchell II*, which found a fiduciary obligation, involved a situation where the government not only controlled the trust corpus, but also had an obligation to manage it for the benefit of the Indians. But the language of *Mitchell II* makes quite clear that control alone is sufficient to create a fiduciary relationship. The Supreme Court in that case emphasized that:

> [W]here the Federal Government takes on or has *control or supervision* over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

Mitchell II, 463 U.S. at 225, 103 S. Ct. 2961 (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 624 F.2d 981, 987 (Ct. Cl. 1980)) (emphasis added).

In *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996), we held that control alone was sufficient to establish a fiduciary relationship there. In that case, in 1964, Native American allottees, pursuant to the leasing power extended to them by 25 U.S.C. § 415,[9]

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[9] In 1964, section 415 provided, in pertinent part, that "[a]ny restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential or business purposes . . . and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior." The statute was

collectively leased their land for use as a commercial golf course. In 1990, the Bureau of Indian Affairs, acting under 25 C.F.R. § 162.14,[10] determined that the lessee had breached the lease agreement and that this breach precluded the lessee from exercising an option to renew the lease.

The allottees brought a breach of trust action against the United States in the Court of Federal Claims for money damages arising from the government's refusal to allow the lessee to renew the lease. The court granted a motion to dismiss by the United States for lack of subject matter jurisdiction, concluding that section 415 and the corresponding regulations "cannot be fairly interpreted to mandate the payment of compensation for breaches thereof." *Brown*, 86 F.3d at 1557. In reaching that conclusion, the trial court noted that the government's "control over the Indian lands authorized by the applicable legal provisions is not sufficiently elaborate or pervasive to create a fiduciary obligation in the United States." *Id.* at 1558.

On appeal, the United States argued that under *Mitchell II*, fiduciary "liability only comes into existence when the government actively manages the land at issue." *Id.* We disagreed, reasoning that:

> Brown contends, quite correctly, that the trial court erred in the instant case by imposing a more restrictive test for the existence of a fiduciary duty than was established by *Mitchell II*. The Supreme

amended in 1970 and this portion of the statute may now be found in subsection (a) of current section 415.

[10] That regulation, in pertinent part, empowered the Secretary of the Interior to terminate a lease made under section 415 "[u]pon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part."

> Court did not qualify "control or supervision" with modifiers such as "significant," "comprehensive," "pervasive," or "elaborate." Nor did the Court anywhere suggest that the assumption of either control or supervision alone was insufficient to give rise to an enforceable fiduciary duty.

Id. at 1561. We therefore determined that "[t]he proper test of whether the government has assumed fiduciary duties in the commercial leasing of allotted lands is thus whether," under the pertinent statutes and/or regulations, "the Secretary [of the Interior], rather than the allottees, has control or supervision over the leasing program." *Id.*[11]

In the present case, the 1960 Act authorizes the government to use the Tribe's trust property for governmental purposes. Pub. L. No. 86-392, 74 Stat. 8 (1960) (creating trust "subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes. . . ."). We think that, to the extent that the government has actively used any part of the Tribe's trust property, and has done so in a manner where its control over the buildings it occupies is essentially exclusive, the portions of the property that have been so used can no longer be classified as being held in merely a "bare trust" under *Mitchell I*. Rather, the government's decision to use such trust property for its own purposes carries a responsibility to act as a fiduciary. Although

[11] We note, however, that even where the government has neither control nor supervision of trust property it may have certain fiduciary obligations. *See, e.g., Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 39 S. Ct. 185, 63 L. Ed. 504 (1919) (holding that United States could not alienate trust lands currently occupied by Native Americans).

neither the 1960 Act nor any pertinent regulation sets forth clear guidelines as to how the government must manage the trust property, we think it is reasonable to infer that the government's use of any part of the property requires the government to act in accordance with the duties of a common law trustee, as is discussed in greater detail below. *See Restatement (Second) of Trusts* § 176 cmt. b (1959) ("It is the duty of the trustee to use reasonable care to protect the trust property from loss or damage."). Such a duty would apply only as to the specific parcels of trust property that the federal government has used and controlled, and possibly the grounds immediately surrounding such parcels.

The record in this case is unclear as to the extent of the government's control and use of the many buildings and grounds comprising Fort Apache. The Tribe alleges in its complaint that it "has not had control over the Tribe's buildings and improvements used, occupied, controlled, supervised and managed by [the United States] for Federal government administrative and school purposes." To the extent that the federal government has, indeed, used buildings to the exclusion of the Tribe, we think the federal government does owe a fiduciary duty. Where such use and control was absent, the government owes no such duty. On remand the Court of Federal Claims must determine which portions of the trust property were under exclusive United States control and thus the subject of a fiduciary obligation.[12]

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[12] If any of the buildings was constructed after the creation of the trust in 1960, the government's obligation with respect to those buildings may be quite different.

V

We must next determine whether the complaint here states a claim enforceable in a present suit for money damages with respect to the property controlled by the United States. It is undisputed that the 1960 Act does not explicitly define the government's obligations. Once we have determined that a fiduciary obligation exists by virtue of the governing statute or regulations, it is well established that we then look to the common law of trusts, particularly as reflected in the *Restatement (Second) of Trusts*, for assistance in defining the nature of that obligation. For example, in *Mitchell II*, the Court relied upon the *Restatement (Second) of Trusts* and secondary authorities to inform its discussion of the remedies available to beneficiaries for a trustee's breach of its obligations. *Mitchell II*, 463 U.S. at 226, 103 S. Ct. 2961. This approach by the Court follows on several decisions in breach of trust cases brought by Native Americans that similarly relied upon the Restatement or secondary authorities on the common law of trusts. For example, in *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S. Ct. 1049, 86 L. Ed. 1480 (1942), the Court cited with approval the *Restatement (First) of Trusts* when adjudicating a breach of trust claim brought against the United States by a Native American tribe. *See also United States v. Mason*, 412 U.S. 391, 398, 93 S. Ct. 2202, 37 L. Ed. 2d 22 (1973) (relying on secondary authority); *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, ——, 121 S. Ct. 1060, 1068, 149 L. Ed. 2d 87 (U.S. 2001) (citing to the *Restatement (Second) of Trusts*); *cf. Kolstad v. American Dental Ass'n*, 527 U.S. 526, 538, 541, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999) (looking to

Restatements of Torts and Agency for guidance in interpreting federal statute).

Under the common law of trusts, it is indisputable that a trustee has an affirmative duty to act reasonably to preserve the trust property. As the Restatement makes clear, "[t]he trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property." *Restatement (Second) of Trusts* § 176 (1959). Comment (b) to this provision makes clear that this obligation extends to the protection of the trust property from loss or damage: "It is the duty of the trustee to use reasonable care to protect the trust property from loss or damage."

In *Masayesva ex rel. Hopi Indian Tribe v. Hale*, 118 F.3d 1371, 1385 (9th Cir. 1997), *cert. denied*, 522 U.S. 1114, 118 S. Ct. 1048, 140 L. Ed. 2d 112 (1998), the Hopi Tribe brought a breach of trust action against, *inter alia*, the United States, to recover damages for the overgrazing, by another tribe's cattle, of land held in trust by the United States for both tribes. While affirming the district court's judgment of no liability, the Ninth Circuit noted that the district court appeared to have applied the wrong standard because it applied a "reasonable person" rather than a "reasonable trustee" standard:

> Since the government's liability is predicated on trust obligations, it need take those protective measures that a reasonable or prudent trustee would take. Restatement, (Second) Trusts, § 176.

Id. at 1385 (internal citations omitted). *See also Coast Indian Community v. United States*, 213 Ct. Cl. 129, 550 F.2d 639, 653 (Ct. Cl. 1977) (per curiam) (adopting trial court's decision which awarded damages to

individual Native Americans for government's breach of its fiduciary obligation "to exercise due care and prudence to preserve the trust property"); *cf. Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 637 (10th Cir. 1998) (noting that the common law of trusts obligates a trustee to "take steps to preserve the trust property from loss, damage or diminution in value"), *cert. denied*, 526 U.S. 1068, 119 S. Ct. 1461, 143 L. Ed. 2d 546 (1999); *Pelt v. Utah*, 104 F.3d 1534, 1542-44 (10th Cir. 1996) (concluding, based in part on application of section 2 of the *Restatement (Second) of Trusts* (1959), that individual Native Americans beneficiaries of an oil and gas royalty trust fund had properly stated a breach of trust claim arising from Utah's alleged mismanagement of that fund).

Other secondary authorities support the proposition that the trustee has an affirmative duty to act reasonably to preserve the trust property. As Professor Bogert has noted:

> The trustee has a duty to protect the trust property against damage or destruction. He is obligated to the beneficiary to do all acts necessary for the preservation of the trust res which would be performed by a reasonably prudent man employing his own like property for purposes similar to those of the trust.

George G. Bogert, *The Law of Trusts and Trustees*, § 582, at 346 (2d ed. 1980). *See also* 2A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 176, at 482 (4th ed. 1987) ("It is the duty of the trustee to use care and skill to preserve the trust property. The standard of care and skill which is applicable to this duty, as it is to his other duties, is that of a man of ordinary prudence.") [hereinafter Scott & Fratcher].

Here we believe that general principles of trust law obligate the United States "to use reasonable care and skill," *Restatement (Second) of Trusts* § 176, to "preserve the trust property from loss, damage or diminution in value." *Branson Sch. Dist. RE-82*, 161 F.3d at 637. This obligation includes an obligation to make appropriate repairs to buildings. As stated in 3 Scott & Fratcher, § 188.2, at 53-54, "[t]he trustee is ordinarily under a duty to keep in proper repair buildings and other property that he holds in trust. . . . Such repairs include whatever is reasonably necessary to preserve the property and to keep it in proper condition." The government as trustee "owes the beneficiary [here, the Tribe] the duty of using the care of a reasonably prudent man in protecting the trust res against decay and deterioration caused by use, by the elements, by catastrophe, or otherwise. . . ." Bogert, *The Law of Trusts and Trustees*, § 600, at 513. Indeed, under the common law of trusts, "[t]he first duty of a trustee must be to preserve the trust property intact. To do this, he must not suffer the estate to waste or diminish, or fall out of repair. . . ." *Id.* at 514.

A trustee's failure to act reasonably to preserve the trust property will also support a claim for permissive waste, a type of claim which is analogous to a claim under the law of property. "Waste" is generally defined as "the destruction, alteration, misuse, or neglect of property by one in rightful possession to the detriment of another's interest in the same property." 8 Richard R. Powell & Michael A. Wolf, *Powell on Real Property*, ¶ 636, at 56-3 (2000).

"Permissive waste," in turn, generally results "from the failure of the possessor to exercise the care of a reasonable person to preserve and protect the estate

for future interests." 8 *id.* ¶ 640[3], at 56-22. That "care of a reasonable person" accordingly requires a tenant to "keep the premises in the condition it was in when the tenancy began, general wear and tear excepted." 8 *id.* ¶ 640[3], at 56-25.

In short, the government here has a fiduciary obligation to act reasonably to maintain and repair the trust property. It is also well settled that where, as here, a trust is created for successive beneficiaries, the trustee owes a duty to act impartially as between or among them. As the Restatement makes clear, "[i]f a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests." *Restatement (Second) of Trusts* § 232 (1959). The court must be particularly careful in scrutinizing the government's actions since the government's simultaneous role as trustee and beneficiary of the trust creates a conflict of interest as to the fulfillment of that fiduciary obligation. Indeed, this type of conflict is hardly unique. It is axiomatic that where the sole trustee is one of the beneficiaries, there is a "danger that the trustee will unduly favor himself. 2 Scott & Fratcher, § 99.3, at 63. Actions of the trustee in such a situation "might well be subject to careful scrutiny to determine whether in view of [its] antagonistic interest [it] was abusing the discretion conferred upon" it to fulfill its obligations to the Tribe. 2 *id.* § 107.1, at 120.

Application of these principles mandates that "[w]here the trustee is one of the beneficiaries, he will not be permitted in the administration of the trust to favor his own interest at the expense of that of other beneficiaries." 2A *id.* § 183, at 560. In other words, notwithstanding its role as a beneficiary, the United

States as trustee is required "to act with due regard" to the interests of the Tribe in the trust property. *Restatement (Second) of Trusts* § 232 (1959).

While we look to the law of trusts for the general principles that govern the obligations of the United States as trustee, in each case we must also examine the particular statute, treaty, "or other fundamental document," *Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961, that creates the trust relationship in order to determine the nature of that relationship and whether the general law of trusts has been altered in any particular way, either by the imposition of additional obligations or by the modification of existing obligations. Here, we believe that the 1960 Act establishes several important principles.

First, the right of the United States to use the trust property is expressly limited to use for "administrative or school purposes." Pub. L. No. 86-392, 74 Stat. 8 (1960). Use of the property for other purposes constitutes a breach of trust. Indeed, the government appears to agree, but urges that such impermissible uses have not occurred here.

Second, the reasonableness of the government's actions are to be measured by the potential loss of economic value to the Tribe unless the Tribe can establish that the United States, when it passed the 1960 Act, undertook an obligation to maintain the property for other purposes. Indeed, as the Restatement makes clear, "[t]he intention of the settlor which determines the terms of the trust is his intention *at the time of the creation of the trust. . . .*" *Restatement (Second) of Trusts* § 4 cmt. a (emphasis added). Our attention has been directed to nothing in the statute, its background, or its legislative history that suggests that

the United States assumed any obligation to maintain the property for aesthetic or historical purposes. Absent further evidence that the trust created by the 1960 Act had non-economic purposes, the Court of Federal Claims must assume that the purpose was entirely economic.

Third, the obligation of the United States to maintain the property for eventual transfer to the Tribe must be defined in light of the anticipated duration of the United States' use of the trust property at the time the 1960 Act was passed; the possible need of the United States to modify or demolish existing structures in order to make use of the property during the period of United States occupancy; and the economic value of the property at the time of the alleged breach. In deciding these questions, the propriety of the actions of the United States is to be measured against the standard of a reasonable trustee. *Restatement (Second) of Trusts* § 176.

Finally, in addition to an obligation to maintain and repair the property, the United States may be obligated to restore the property upon transfer to the Tribe if the United States has violated its maintenance obligations during the term of the trust[13] or if it has (properly) modified the property to suit its own needs during the term of the trust. We do not suggest that the occurrence of normal wear and tear obligates the United States here to restore the property to its

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[13] *See Restatement (First) of Property* § 187 cmt. b at 760 (1936) (stating that where the owner of a life estate has improperly altered a building, the owner of an indefeasibly vested future interest in that building can compel the "restoration of the premises to the condition in which they were prior to the doing of the prohibited act").

original (1960) condition, and we otherwise express no views as to the existence or nature of an obligation to restore the property, which must be determined by the general law of trusts as modified by the 1960 Act.

VI

It remains only to be determined whether breach of the government's obligations, if proven by the Tribe on remand, gives rise to a presently cognizable claim for money damages. We hold that it does. As the Supreme Court held in *Mitchell II*:

> Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust.

Mitchell II, 463 U.S. at 226, 103 S. Ct. 2961. The Restatement of Trusts provides further support for this proposition. *Restatement (Second) of Trusts* § 205 (1959) ("If the trustee commits a breach of trust, he is chargeable with (a) any loss or depreciation in value of the trust estate resulting from the breach of trust; . . .").

While the Court of Federal Claims appeared to recognize that a traditional breach of trust claim, if one was available, necessarily states a claim for money damages, that court appeared to suggest that a damages remedy for permissive waste by analogy to the law of property could not be maintained at all, and that the only available remedy was injunctive. In this the court was mistaken.

The Court of Federal Claims observed that "an action for permissive waste, even if proper, does not ordinarily give rise to a money claim." *White Mountain*

Apache Tribe, 46 Fed. Cl. at 28. The government urges that sections 188, 189, and 195 of the *Restatement (First) of the Law of Property* (1936) apply to the Tribe's claims and support the court's holding. But those provisions have no application here. That Restatement is clear that it does not directly apply to trust situations. *Id.*, note to ch. 13, at 753 ("When the person seeking protection has a future beneficial interest under a trust, the protections available to him . . . are a part of the Law of Trusts and are outside the scope of this Restatement."). In any event, those provisions discuss the remedies available to owners of *contingent* future interests in property when the present holder of a life estate acts or fails to act in a manner causing damage to that property. For example, section 188 of the Restatement provides, in pertinent part, that the holder of a contingent future interest in property "cannot recover damages immediately payable to himself for any act or omission of the owner of the estate for life."[14] Similarly, section 189 provides, in pertinent part, that the owner of a contingent future

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[14] Section 188 provides: "When a present estate for life precedes a future interest in fee simple which is subject to a condition precedent, or which is vested but defeasible either in whole or in part upon an event the occurrence of which is not improbable, then the owner of such future interest, in a judicial proceeding brought solely in his own behalf, cannot recover damages immediately payable to himself for any act or omission of the owner of the estate for life." *Restatement (First) of Law of Property* § 188 (1936). Comment (a) accompanying this section makes clear that it applies *only to holders of uncertain* future interests: "All situations to which the negative rule in this Section is applicable have two elements in common. . . . *The second of these is an uncertainty as to the future interest.*" *Id.* cmt. a, at 765-66 (emphasis added). Here, however, there is no "uncertainty as to the future interest" of the Tribe in the trust property.

interest can obtain a variety of equitable remedies against the present injurious owner of a life estate in property, including "a prohibitive injunction appropriate to prevent the future doing of affirmative acts of the type theretofore done, or threatened to be done, by the owner of the estate for life." *Id.* at § 189(a).

There is nothing contingent about the Tribe' s future interest in the trust property. In other words, nothing can divest the Tribe of full title to that property once the government terminates its trust relationship. The Tribe's interest in the trust property is accordingly better described as an indefeasibly vested future interest, and the government's interest better described as one akin to a present life estate in the trust property.

Under these circumstances, the more nearly analogous provisions are sections 139 and 187 of the *Restatement (First) of Property* (1936). Under those sections, a beneficiary has an immediate claim for money damages for any alleged failure to maintain and repair buildings.

For example, section 139, entitled "Duty Not to Permit Deterioration of Land or Structures," provides, in pertinent part, that (subject to certain exceptions not applicable here) "the owner of an estate for life . . . has a duty to preserve the land and structures in a reasonable state of repair. . . ." Moreover, comment (c) to that section provides, in pertinent part, that:

> A repair or act of preservation is clearly within such duty whenever such repair or act is necessary to prevent a progressive deterioration of the land or structures or whenever the condition existing as a result of the failure to make such repair will amount to substantial deterioration of the land or structures

> from the condition in which such land and structures were at the time of the commencement of the estate for life.

Id. at § 139 cmt. c. Section 187 of the Restatement further provides that the owner of an indefeasibly vested future interest has the right to expect compliance by the owner of the life estate with this duty of preservation:

> When the ownership of land is divided into two interests, one being a present estate for life and the other being an indefeasibly vested future interest in fee simple absolute, then the future interest includes (a) a right correlative to each of the duties of the owner of an estate for life, [as] stated in . . . § 139 (duty not to permit deterioration of land or structures). . . . *Id.* at § 187.

Finally, an accompanying comment makes clear that in the event the owner of the preceding estate—here, the United States—breaches this duty, the owner of the indefeasibly vested future interest can recover immediate damages for that breach:

> When the right of the owner of the future interest is that the owner of the estate for life shall do a given act, as for example, . . . make repairs (see § 139), then this right is made effective through compelling by judicial action the specific doing of the act in question, *or through giving to the owner of the future interest a judgment for the damages caused to him by the omission to act.*

Id. at § 187 cmt. b, at 759 (emphasis added).[15]

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[15] The dissent concludes that there is no right to sue for damages because the Tribe's future interest is "contingent" under section 187 of the *Restatement (First) of Property*, there being "no certainty that the Tribe's future interest will ever vest." Even if the *Restatement (First) of Property* were the correct source of law for trust questions, enjoyment of the estate by the Tribe was certain because Congress, in providing for a remainder interest in the Tribe, plainly did not contemplate that the government's use for administrative or school purposes would be perpetual.

While the timing of the end of the government's use may have been uncertain, there was no question that the Tribe had the only remainder interest and that that interest was therefore indefeasibly vested rather than contingent. *See Restatement (First) of Property* § 157 cmt. f, at 546 (1936) ("When a remainder is indefeasibly vested, the remainderman is certain to acquire a present interest at some time in the future, and is also certain to be entitled to retain permanently thereafter the present interest so acquired.").

To be sure, the *Restatement (First) of Property* is concerned with the right of a vested remainderman who succeeds after the end of a life estate (section 187) or multiple life estates (section 191), recognizing that the remainderman in both situations has the right to sue for damages. *The Restatement (First) of Property* does not address the timing of a remainderman's suit for damages where the timing of the enjoyment depends upon another event (here the end of the government's administrative or school use). This is hardly surprising since at common law this conveyance would have violated the rule against perpetuities. *See id.* at § 228 cmt. b., illus. 2, at 938 ("A, owning Blackacre in fee simple absolute, transfers Blackacre 'to B County so long as Blackacre is used as the site of the County Court House; thereafter to C and his heirs.' The attempted executory interest to C fails because of a violation of the rule against perpetuities."). The rule against perpetuities, however, is not a limitation on conveyances by the United States government.

This uncertainty in the duration of the prior estate, whether under the law of trusts or the law of property, suggests only that the computation of damages before the end of the preceding use

In sum, we hold that the Tribe's claim gives rise to a cognizable claim for money damages. Accordingly, we hold that the Court of Federal Claims has jurisdiction to entertain it.

VII

We conclude that the 1960 Act creates an enforceable fiduciary relationship between the United States and the Tribe, the breach of which may give rise to a cognizable claim for money damages. On remand, however, the Court of Federal Claims may determine that the suit is premature as to buildings that the United States continues to use for administrative or school purposes. *See* note 15, *supra*. On remand, the Court of Federal Claims must further determine which portions of the property were under United States control. Even as to the property that was so controlled, we recognize that the existence of this "general fiduciary relationship does not mean that any and every claim . . . necessarily states a proper claim for breach

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may be possible in one situation (life estates) using actuarial tables but may be difficult in the latter situation until the occurrence of the event (here, the end of school or administrative use), and that the right of suit for damages in the latter situation may be premature until the happening of that event (end of statutorily authorized uses). *Cf. Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000) (holding that landowners' "takings claims [for government-caused erosion to property] accrued when the erosion had substantially encroached the parcels at issue and the damages were reasonably foreseeable").

Clearly this lawsuit is not premature as for those buildings that the government has ceased to use for administrative or school purposes. We leave this issue of possible prematurity as to those buildings still used by the government for resolution by the Court of Federal Claims, particularly since decision of those timing issues may affect the running of the statute of limitations.

of the trust a claim which must be fully tried" in the Court of Federal Claims. *Pawnee v. United States*, 830 F.2d 187, 191 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032, 108 S. Ct. 2014, 100 L. Ed. 2d 602 (1988). The merits of the Tribe's claim will be accordingly determined on remand in the light of this decision.

On this appeal, the government also argued that even if the Tribe has stated a proper claim, it is barred under the six-year statute of limitations set forth in 28 U.S.C. § 2501. We note that the Court of Federal Claims did not reach this argument, and we therefore leave this unanswered question to that court for resolution on remand.

CONCLUSION

For the foregoing reasons, the decision of the Court of Federal Claims is reversed and remanded.

REVERSED AND REMANDED.

No costs.

MAYER, Chief Judge, dissenting.

I would affirm, both because the 1960 Act did not impose a fiduciary duty on the government and because the Tribe does not hold an indefeasibly vested future interest in the Fort Apache land and buildings. In *United States v. Mitchell*, 445 U.S. 535, 542, 546, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) (*Mitchell I*), the Supreme Court held that statutes and regulations that create only a limited or "bare" trust relationship between the United States and the Tribes do not impose fiduciary obligations which would give rise to money damages. However, in *United States v. Mitchell*, 463 U.S. 206, 224, 103 S. Ct. 2961, 77 L.E. 2d 580 (1983) (*Mitchell II*), the Court found that a fiduciary obligation existed when the statute or regulations give the government full responsibility for managing Indian resources and land for the benefit of the Indians. The statutes and regulations define the scope of the fiduciary obligation. *Id.* We held in *Brown v. United States*, 86 F.3d 1554, 1560 (Fed. Cir. 1996), that the fiduciary duty need not be explicit in the statute or regulation, but the government must take on or have control or supervision of tribal monies or property.

In this case, the 1960 Act, which created the trust, reserved to the government the right to use any part of the land and improvements for administrative or school purposes for as long as they are needed for those purposes. This provision limits the government's obligation to the Tribe and creates a bare trust relationship similar to the General Allotment Act considered in *Mitchell I*. Nothing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carves the government's right to unrestricted use for the specified

purposes out of the trust. Although the school is for the benefit of the Tribe, the 1960 Act expressly permits, but does not require, the government to use the fort as an Indian school. The use of the phrase "for as long as they are needed," far from expressing a fiduciary obligation, vests discretion in the Secretary of the Interior to determine how long to operate the Indian school. Because the subject matter of the trust excluded the government's use privilege from the start, it has no fiduciary obligation to maintain the land and improvements for the Tribe that could lead to money damages.

Accordingly, there should be no need to address whether the future interest held by the Tribe is vested or contingent. In reaching the issue, however, the court has misconstrued the nature of the trust and improvidently held that "[t]here is nothing contingent about the Tribe's future interest in the trust property." *White Mountain Apache Tribe v. United States*, *ante* at 25. In fact, the government has reserved the right to use the trust property "for as long as [it is] needed" for school or administrative purposes. Nothing in the grant precludes the possibility that it will be needed in perpetuity for those purposes; there is no certainty that the Tribe's future interest will ever vest. It is therefore contingent and, as the court aptly points out, the owner of a contingent future interest has no right to sue for money damages for permissive waste. *Id.*

The government argued that the Tribe's future interest was contingent and that the common law of property as reflected in sections 188, 189, and 195 of the Restatement (First) of the Law of Property bars the Tribe's claim for monetary damages. The court does not disagree that money damages would be barred if

the Tribe's future interest were contingent; it merely asserts that it is not. Therein lies the error. As the court said,

> Section 188 provides: "When a present estate for life precedes a future interest in fee simple which is subject to a condition precedent, or which is vested but defeasible either in whole or in part upon an event the occurrence of which is not improbable, then the owner of such future interest, in a judicial proceeding brought solely in his behalf, cannot recover damages immediately payable to himself for any act or omission of the owner of the estate for life." *Restatement (First) of Law of Property* § 188 (1936).

White Mountain Apache Tribe, *ante* at 24 n.14. The court goes on to note that there must be an uncertainty as to the future interest for this rule to apply, and makes the conclusory statement that there is "no 'uncertainty as to the future interest' of the Tribe in the trust property." *Id.* Contrary to this assertion, there is a condition precedent to the vesting of the Tribe's future interest, namely that the government no longer needs to use the property for school or administrative purposes. Until the Secretary of the Interior determines that the property is no longer needed for school or administrative purposes, the condition precedent will not occur, and the Tribe's interest will not vest. Because there is nothing in the 1960 Act that prevents the government from continuing to use the property for school or administrative purposes indefinitely, there is no guarantee that the condition precedent will ever be met and the Tribe's future interest will ever vest. This precludes its claim for money damages and is an

independent ground on which to affirm the judgment of the Court of Federal Claims.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 99-148L

WHITE MOUNTAIN APACHE TRIBE, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Nov. 19, 1999

OPINION

FIRESTONE, Judge.

This case comes before the court on defendant's motion to dismiss for failure to state a claim for which relief may be granted and for lack of subject matter jurisdiction. The dispute arises over the federal government's alleged breach of trust to plaintiff, the White Mountain Apache Tribe, with respect to certain property, and improvements thereon, held by defendant in trust for the Tribe. The property and improvements involved, known as "Fort Apache" and the Theodore Roosevelt School, are located on the Fort Apache Indian Reservation in the White Mountains of east-central Arizona. Plaintiff alleges that defendant breached fiduciary obligations owed to plaintiff in failing to maintain, protect, repair and preserve the trust property. Plaintiff seeks damages in the amount of $14,000,000.

Defendant argues that plaintiff fails to state a claim for which relief may be granted, asserting that it owes no trust obligation with respect to the subject property that would give rise to a claim for money damages. Defendant further argues that plaintiff's claim is time barred by the six-year statute of limitations imposed on claims for money damages in this court. After carefully considering the arguments of the parties, the court hereby **GRANTS** defendant's motion to dismiss for failure to state a claim for which relief may be granted.

FACTS

This controversy involves land and various improvements thereon, known as "Fort Apache," located within the Fort Apache Indian reservation in east-central Arizona. The United States Army established Fort Apache in 1870. During the 1920's, Congress placed the Fort under the control of the Department of the Interior and reserved a portion of the Fort for use as the Theodore Roosevelt Indian Boarding School.[1] The school presently continues to operate for a small number of students.[2] By Act of March 18, 1960, Congress declared the Fort Apache land, together with the improvements thereon, "be held by the United States

[1] "The Secretary of the Interior is authorized to establish and maintain the former Fort Apache military post as an Indian boarding school for the purpose of carrying out treaty obligations, to be known as the Theodore Roosevelt Indian School: Provided, That the Fort Apache military post, and land appurtenant thereto, shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purposes. 25 U.S.C. § 277 (1994)."

[2] The future of the school as a viable institution is apparently under review. At argument the plaintiff explained that the Tribe anticipates that the property might be available for their use sometime in the near future.

in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose."[3] In November 1965, the Tribe governing council resolved that the area should be placed on the National Historic Register. The National Park Service designated the Fort as a National Historic Site in 1976.

Plaintiff alleges in its complaint that the defendant has allowed the Fort Apache land and improvements to fall into disrepair, and in some cases, buildings have even been demolished, under its use, occupancy, control, supervision, management, and administration. Plaintiff alleges that in 1993, recognizing the extent of the deterioration, it began to take steps to protect the Fort. As part of this effort, plaintiff adopted a master plan for protection, preservation, and restoration of the Fort. Thereafter, in September 1997, the Fort was placed on the World Monument Watch "1998 List of 100 Most Endangered Monuments." The following year, in November 1998, the Tribe commissioned a study of the buildings and obtained cost estimates for their restoration and preservation. Plaintiff further alleges that the Department of the Interior ("DOI") and the Bureau of Indian Affairs ("BIA") have failed to perform the necessary maintenance and repairs to the properties.

In the complaint filed in this court on March 19, 1999, plaintiff seeks $14,000,000 in damages for breach of trust, so that the Tribe can repair and restore the trust property. Plaintiff also seeks unspecified compensation for the "economic loss and value of lease/rental fees for the subject trust corpus." On May 19, 1999, defendant

[3] *See* Pub. L. No. 86-392, 74 Stat. 8.

moved to dismiss the case for failure to state a claim for which relief may be granted and lack of jurisdiction. In particular, defendant denies that it has any trust responsibility to restore or maintain Fort Apache and the Theodore Roosevelt School in a fashion that could give rise to a money-damages claim. In addition, defendant argues that plaintiff's claim is, in any event, barred by the six-year statute of limitations governing suits filed under 28 U.S.C. §§ 1491 and 1505 because plaintiff knew or should have known of the deteriorated state of the property for more than six years.

The motion has been fully briefed and oral argument was held on November 8, 1999. For the reasons that follow, defendant's motion to dismiss for failure to state a claim under Rule 12(b)(4) is granted

DISCUSSION

1. Motion to Dismiss

The standard for deciding a motion to dismiss is well settled. In deciding a motion to dismiss, "whether on the ground of lack of jurisdiction over the subject matter, or for failure to state a cause of action," the court must construe the allegations of the complaint most favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *see Morris v. United States*, 33 Fed. Cl. 733, 741 (1995). In addition, the court must accept as true any undisputed allegations of fact made by plaintiff. *See Haberman v. United States*, 26 Cl Ct. 1405, 1410 (1992). Ultimately, however, the burden is on plaintiff to establish jurisdiction by a preponderance of the evidence. *See Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988).

2. Breach of Trust

Plaintiff bases the court's jurisdiction over this action on the Tucker Act, 28 U.S.C. § 1491(a) (1994) and the Indian Tucker Act, 28 U.S.C. § 1505 (1994). The Tucker Act grants this court jurisdiction over actions "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491. Section 1505 confers jurisdiction on this court to hear any tribal claim that "is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe. . . ." 28 U.S.C. § 1505.

Neither section 1491 nor section 1505, however, creates a substantive right against the United States for money damages. *See United States v. Testan*, 424 U.S. 392, 398, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976). These acts are merely jurisdictional. Where plaintiff has alleged a breach of trust, as in the instant case, the court must first decide the threshold issue of whether the statute or regulations cited by plaintiff create a fiduciary duty on behalf of the defendant, the breach of which would give rise to a claim for money damages. *See United States v. Mitchell*, 463 U.S. 206, 219, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*); *Pawnee v. United States*, 830 F.2d 187, 189 (Fed. Cir. 1987). "That there is such a general fiduciary relationship does not mean that any and every claim by the Indian lessor necessarily states a proper claim for breach of the trust—a claim which must be fully tried in the Claims Court." *Pawnee*, 830 F.2d at 191. Whether plaintiff has alleged sufficient facts to support a breach of trust is

secondary to the issue of whether a money-mandating fiduciary relationship exists.

The Supreme Court has established the parameters for our inquiry into whether the statutes and regulations that plaintiff relies upon create fiduciary duties in its *Mitchell I* and *Mitchell II* decisions. *United States v. Mitchell*, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) (*Mitchell I*); *Mitchell II*, 463 U.S. at 206, 103 S. Ct. 2961. Read together, these two decisions provide that whether a claim for money damages exists depends upon whether the claimant can prove the government has shown an intent to go beyond the limited, or bare trust relationship that exists between the United States and the Tribes. A claim for money damages requires that the government has expressly or impliedly undertaken to act in a fiduciary capacity toward tribal resources. In order to demonstrate that a fiduciary relationship exists, the claimant must either point to specific statutes or regulations that impose a duty upon the government to manage tribal resources for the benefit of the tribe or demonstrate that the government has actually undertaken to do so. *See Mitchell II*, 463 U.S. at 224-25, 103 S. Ct. 2961.

In *Mitchell I*, the Supreme Court held that statutes and regulations that create only a limited or "bare" trust relationship between the United States and the Tribes do not impose fiduciary obligations, which would give rise to money damages. *See Mitchell I*, 445 U.S. at 545, 100 S. Ct. 1349.[4] At issue in *Mitchell I* was

[4] *See also Eastern Band of Cherokee Indians v. United States*, 16 Cl. Ct. 75, 78 (1988) ("If the source of substantive law establishes only a general trust relationship, the government's fiduciary obligations are not those of a private trustee.") (citing *Montana Bank v. United States*, 7 Cl. Ct. 601, 613 (1985)).

whether the General Allotment Act imposed a duty on behalf of the government to manage the Tribe's timber resources. *See id.* at 542, 100 S. Ct. 1349. The court found that the language and legislative history of the Act indicated that "the [Indian] allottee, and not the United States, was to manage the land." *Id.* at 543, 100 S. Ct. 1349 (citing Indian General Allotment Act, 1, 2, 5, 25 U.S.C. §§ 331, 332, 335). The court further found that Congress directed that the land should be held in "trust" not because it intended to give the government fiduciary obligations, "but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation." *Id.* at 544, 100 S. Ct. 1349. Accordingly, the court remanded the case to the Court of Claims to determine if any of the other statutes or regulations cited by plaintiff would provide a basis for imposing a fiduciary duty on the government.

The Supreme Court again had the opportunity to pass on the government's duties with respect to timber resources held in trust by the United States for the Tribe in *Mitchell II*, 463 U.S. at 206, 103 S. Ct. 2961. In *Mitchell II*, the Supreme Court found that the forest management statutes and regulations governing timber resources created a fiduciary relationship between the government and the tribe and that breach of that trust would give rise to a money claim. *See id.* at 224, 103 S. Ct. 2961. The statutes and regulations at issue in *Mitchell II*, gave the Secretary of Interior "comprehensive control" over management of timber resources. *See id.* at 209, 219, 222, 225, 103 S. Ct. 2961. Under the forest management statute, the Secretary of Interior is required to conduct timber sales "based upon a consideration of the needs and best interests of the Indian

owner," and use the proceeds from such sales to benefit the Indians. *Id.* at 209, 103 S. Ct. 2961 (citing 25 U.S.C. §§ 405-407). The regulations further direct the government to manage "the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests." *Id.* at 224, 103 S. Ct. 2961 (quoting Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911)). The court found that this language made the government a trustee with respect to the Tribe's timber resources. In addition, the court found that "where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties. . . ." *Id.* at 225, 103 S. Ct. 2961. The court concluded that breach of this fiduciary relationship gave rise to a claim for money damages, which was within the jurisdiction of the Court of Claims. *See id.* at 228, 103 S. Ct. 2961.

The courts have applied this dichotomy between a limited, or bare trust and a fiduciary relationship, that was laid out in the *Mitchell I* and *Mitchell II* decisions, to determine whether a trust relationship exists with respect to other resources. Applying the *Mitchell II* rationale, the Federal Circuit found that statutes and regulations governing oil and gas leases created a fiduciary relationship in *Pawnee v. United States*, 830 F.2d at 190. The court found that the Indian Long-term Leasing Act, 25 U.S.C. § 396, and the Federal Oil and Gas Royalty Management Act, 30 U.S.C. §§ 1701-1757, place the government in the role of trustee with respect to oil and gas resources because these statutes:

> (a) give elaborate powers to Interior with respect to those leases, (b) always call for consideration of the best interests of the Indians, (c) require proceeds of the leases to be given to the Indians and, (d) recognize the existence of a general trust relationship toward the Indians with respect to the oil and gas products of these lands.

Id.; see also Brown v. United States, 86 F.3d 1554, 1560 (Fed. Cir. 1996). Based on these factors, the court concluded the mineral leasing acts created fiduciary obligations with respect to mineral leasing similar to the obligations the court found in *Mitchell II* with respect to timber resources. *See Pawnee*, 830 F.2d at 190.[5]

Alternatively, where the claimant cannot demonstrate that the government has "assume[d] the duty of preserving the principal, generating income, and disbursing profits," with respect to the alleged trust property, the courts have not found a fiduciary relationship which would support a claim for money damages. *See, e.g., Grey v. United States*, 21 Cl. Ct. 285, 293 (1990), *aff'd*, 935 F.2d 281 (Fed. Cir. 1991), *reh'g denied*, (1991). In *Grey*, the court refused to find a breach of trust where plaintiff could not point to a

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[5] The court cited various provisions of the acts and their legislative history to support its conclusion. 25 U.S.C. § 396 authorizes the Secretary of Interior to lease Indian lands "for any term of years as may be deemed advisable by the Secretary of the Interior," and "to perform any and all acts . . . necessary for carrying out the provisions of this section in full force and effect." 30 U.S.C. § 1701(b)(4) states that among the purposes of the act is "to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources." Further, 30 U.S.C. §§ 1714 and 1715 provide for royalty payments to Indians.

statute or regulation that created a duty on behalf of the government that would require the government to manage water delivery to and irrigation of individual farm allotments. *See id.*

Similarly, in *White Mountain Apache v. United States*, 11 Cl. Ct. 614 (1987), a case brought by these same plaintiffs, the court held that the Tribe had not established a trust relationship to protect range lands. In *White Mountain Apache*, the court found that the government had a fiduciary obligation not to overgraze the Indian's land because the government had "undertaken to administer" a program of leasing grazing lands to non-indian livestock owners. *Id.* at 650. Nonetheless, the court also found with respect to protecting the Tribe's land in general that a fiduciary duty giving rise to damages did not exist. *See id.* The court held that "[fiduciary] liability cannot attach for the Government's failure to provide funds for fencing the range to protect the reservation itself from trespass or to protect the range within the reservation grazed by Indian cattle from encroachment by permittee cattle." *Id.*

Tested by these standards and precedents, the court in the present case must determine whether under the statutes and regulations identified by plaintiff the defendant owes plaintiff any specific responsibilities with respect to the Fort Apache buildings and improvements that give rise to a money claim for breach of trust.

3. The 1960 Act and Other Statutes

Plaintiff contends that the 1960 Act, the Snyder Act, 25 U.S.C. §§ 2, 13, and various other statutes and regulations impose fiduciary obligations on the government to maintain, protect, repair, and preserve Fort Apache for the benefit of plaintiff. These include: 25 U.S.C. § 277; Title XI of the Education Amendments Act of 1978, 25 U.S.C. § 2005 (1994); Improving America's Schools Act of 1994, 25 C.F.R. Pt. 32.3, 32.4(s)(2); Non-Alienation of Tribal Trust Property, 25 U.S.C. § 177 (1994), 25 C.F.R. § 162.1; and American Indian Trust Fund Management Act, 25 U.S.C. § 4043(c)(5)(C) (1994 & Supp. III 1997). Plaintiff argues that the express trust created by the 1960 Act, in combination with the Snyder Act, and other statutes and regulations, gives the government exclusive control over the Fort Apache site, thereby creating a fiduciary relationship under the standards set forth in *Mitchell II*. Defendant asserts that the government's control over the Fort Apache site, absent any mandate to generate income from the property, is insufficient to create a fiduciary duty to maintain or restore the buildings and improvements at the site, the breach of which would give rise to a money claim. The court agrees with defendant's contentions.

The fundamental flaw in plaintiff's action is that it fails to meet the *Mitchell II* test. Contrary to the plaintiff's contentions, the court views the 1960 Act as similar to the provisions of the General Allotment Act which was found insufficient to establish a money-mandating claim in *Mitchell I*, 445 U.S. at 535, 100 S. Ct. 1349, *Grey*, 21 Cl. Ct. at 285, and *White Mountain Apache*, 11 Cl. Ct. at 614. The 1960 Act merely states that Fort Apache shall be held by the government in trust for the White Mountain Apache Tribe, "subject to

the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed. . . ." Pub. L. No. 86-392, 74 Stat. 8. This language creates a limited, or bare trust relationship between the government and the Tribe. In contrast to the timber management statutes and regulations found to create fiduciary duties in *Mitchell II*, the 1960 Act does not direct the government to manage the Fort Apache site for the benefit of the Tribe. To the contrary, the 1960 Act states that the Secretary of the Interior may use the land and improvements "for administrative or school purposes *for as long as they are needed.*" *Id.* (emphasis added). As the plain language indicates, the Act reserves the Fort Apache site for the federal government's benefit and not for the benefit of the Tribe.[6]

With respect to the Snyder Act, 25 U.S.C. §§ 2 and 13, the court agrees with others of this court who have held that these provisions fail to provide a basis for a money-mandating claim as laid out in *Mitchell II*. In *Allred v. United States*, 33 Fed. Cl. 349 (1995), the court held that the Snyder Act was not a money-mandating statute for jurisdictional purposes. Relying on the Supreme Court's opinion in *Lincoln v. Vigil*, 508 U.S.

[6] Plaintiff also cites 25 U.S.C. § 277 as authority for its proposition that the government is a fiduciary with respect to Fort Apache. Section 277, which preceded the 1960 Act, granted possession of Fort Apache to the Secretary of Interior, authorizing the Secretary to establish the Theodore Roosevelt School. Section 277 did not direct the Secretary to manage Fort Apache or the School to generate income for the Tribe. Moreover, Section 277 vested possession of the Fort in the Secretary, not in the Tribe. Thus, Section 277 fails to establish even a limited trust relationship like that found in *Mitchell I*.

182, 194, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993), which held that the "general terms" of the Snyder Act do not mandate that the Indian Health Service spend its general appropriations on specific programs aimed at a particular class of individuals, the court found that, likewise, the "[Snyder] Act does not mandate compensation for claims by individuals." *Allred*, 33 Fed. Cl. at 354 (citing *Lincoln*, 508 U.S. at 194, 113 S. Ct. 2024); *See also Vigil v. Andrus*, 667 F.2d 931 (10th Cir. 1982) (holding that Snyder Act is "too broad" to support a conclusion that Congress intended to impose a duty on the government to provide funds for lunches for all Indian school children).

The court also finds that none of the additional statutes or regulations plaintiff cites create the type of fiduciary duty which would mandate money damages to be paid by the federal government. Title XI of the Education Amendments Act of 1978, 25 U.S.C. § 2005, and the Improving America's Schools Act of 1994, 25 C.F.R. Pt. 32.3, 32.4(s)(2), mandate that the Secretary of Interior shall keep all Indian Schools in compliance with applicable health and safety standards.[7] The American Indian Trust Fund Management Act, 25 U.S.C. § 4043, requires the DOI to certify that budget requests made to Congress are adequate to meet the DOI's trust responsibilities to Indian Tribes.

[7] Plaintiff cites *Busby School v. United States*, 8 Cl. Ct. 596 (1985), to support its claim that 25 U.S.C. s 2005 is a money-mandating statute. In *Busby School*, the court held that plaintiff's breach of trust claim based on Section 2005 "withstands defendant's broad motion to dismiss." *Id.* at 601. However, *Busby School* is distinguishable from the facts in this case because in that case the statutory directive in Section 2005 to repair and maintain Indian schools was expressly made part of contracts between the BIA and the school board. *See id.* at 599.

Although these acts impose upon the Secretary general mandates to aid Native Americans, which may be enforceable through a suit for injunctive relief, like the Snyder Act, they provide no substantive right to money damages for violation of any particular statutory directive.

Relying on *Brown v. United States*, plaintiff argues that, even if the statutes and regulations do not expressly create a fiduciary relationship, defendant's day-to-day occupation, use, control, or supervision of Fort Apache under the 1960 Act, and the other statutes and regulations cited, elevates the relationship between defendant and the Tribe to a fiduciary relationship under the *Mitchell II* "control or supervision" test. *See Brown*, 86 F.3d at 1558-62. Under *Mitchell II*, the Supreme Court explained that where the federal government takes on elaborate control or supervision over tribal resources, "the fiduciary relationship normally exists with respect to such monies or properties . . . even though nothing is said expressly in the authorizing or underlying statute . . . about a trust find, or a trust or fiduciary connection." *Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961. Plaintiff argues that because the government has exclusive control over Fort Apache, such a fiduciary relationship exists.

Plaintiff's argument, however, misconstrues the *Brown* court's interpretation of *Mitchell II* by focusing on the extent, rather than the nature of control necessary to establish a fiduciary relationship. The court in *Brown* held that the statutes and regulations governing commercial leasing of Indian lands need not give the government "ongoing management responsibility over the day-to-day administration of commercial leases," in order to satisfy the *Mitchell II*

"control or supervision" test. *Brown*, 86 F.3d at 1561. What the *Brown* court emphasized, and the plaintiff ignores, is that the statutes and regulations at issue in *Brown* create a fiduciary relationship because they give the government not just control over the leasing of tribal lands, but control for the purpose of protecting the Indians' financial interests. *See id.* at 1562. The court found a fiduciary obligation because "the Secretary exercises his or her control over commercial leasing on allotted lands not only for traditional general welfare purposes, . . . but also for the purpose of protecting the [Indians'] financial interests." *Id.*

Under the leasing program at issue in *Brown*, the Secretary of Interior was given authority to approve leases and lease cancellations for Indian lands, dictate leasing terms and forms, and cancel leases without the Indian owner's consent. *See id.* at 1561-62 (citing 25 U.S.C. § 415(a); 25 C.F.R. §§ 162.5(a), 162.14). Moreover, the court noted that the criteria that constrain the Secretary's approval power "are identical to those which traditionally constrain the discretion of a private trustee." *Id.* at 1562. The regulations prohibit approval of leases "at less than the present fair annual rental," and require that "the leases be limited to the minimum duration . . . that will allow the highest economic return to the owner." *Id.* (quoting 25 C.F.R. § 162.5(b), 162.8) (alteration in original). The court concluded that such control over the leasing of Indian lands for the purpose of protecting the Indian financial interests, although not as pervasive as the statutory and regulatory scheme in *Mitchell II*, nevertheless, created a

fiduciary relationship which would support a claim for money damages. *See id.* at 1563.[8]

The 1960 Act and the additional statutes and regulations plaintiff relies upon here are clearly distinguishable from the statutory and regulatory scheme in *Brown*. The 1960 Act and the other statutes and regulations cited by plaintiff do not require the government to manage or operate the Fort Apache site for the Tribe's benefit. Although the cited statutes and regulations may give the government complete control over the Fort Apache site, they do not require that the government manage the Fort Apache site for the purpose of protecting the tribe's financial interests. Indeed, the 1960 Act allows the government to manage and operate the land and buildings for its own benefit for as long as it needs them. Consequently, the statutes and regulations identified by plaintiff do not give rise to fiduciary obligations that allow for monetary claims.

4. Permissive Waste

Plaintiff recognized at oral argument that to hold the government liable for money damages where the government has the right to use the trust property for its own purposes calls for an extension of *Mitchell II*. However, plaintiff asserts that where, as here, the government uses the property held in trust for the

[8] In its complaint, plaintiff makes the argument that the Non-Alienation of Tribal Trust Property Act, 25 U.S.C. § 177, and the regulations found at 25 C.F.R. § 162.1, which were at issue in Brown, give rise to a claim for money damages for breach of trust in the instant case. The court finds these provisions inapplicable here, where the government is not charged with the responsibility of overseeing commercial leases for the benefit of the Tribe, but rather is authorized under the 1960 Act to use the Fort Apache site for its own purposes.

Tribe, it has a duty to preserve the property so that when it is eventually returned to the Tribe it is in a usable condition. Plaintiff likens the historic buildings on the Fort Apache site to a trust corpus, similar to the water rights at issue in *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417 (1991). Plaintiff asserts that the historic buildings—the trust corpus—cannot be destroyed through defendant's neglect, and then returned to the tribe in a worthless state. According to plaintiff, the defendant has a duty to maintain the property in accordance with, at a minimum, the government's own standards for maintaining historic properties.[9]

Plaintiff argues that the defendant's failure to preserve the property is tantamount to "permissive waste," and as such amounts to a breach of trust. While the court is not unsympathetic to plaintiff's concerns, the difficulty with plaintiff's argument is that an action for permissive waste, even if proper, does not ordinarily give rise to a money claim. *See* J.A. Bryant, Jr., Annotation, *Right of Contingent Remainderman to Maintain Action for Damages for Waste*, 56 A.L.R. 3d 677 §§ 2-3 (1974, *Supp.* 1998). The law on "permissive waste"

[9] Plaintiff relies on the National Historic Preservation Act of 1966, ("NHPA"), and its implementing regulations as defining the scope of the federal government's fiduciary obligations with respect to the Fort Apache site. *See* 16 U.S.C. §§ 470 to 470x-6 (1994 & Supp. III 1997); Executive Order No. 11593 (May 13, 1971); and 36 C.F.R. § 800 (1988). Plaintiff recognized at argument that these provisions are procedural in nature and do not affirmatively mandate preservation of historic buildings or other resources. *See National Trust for Historic Preservation v. Blanck*, 938 F. Supp. 908, 925 (D.D.C. 1996) (holding that Congress did not intend the NHPA to create affirmative preservationist responsibilities on the government).

provides that the appropriate remedy for permissive waste is generally an injunction:

> "[A] contingent remainderman of a life estate, whose contingency is not improbable, cannot, acting alone, recover damages immediately payable to himself for waste committed by the life tenant. However, he may, even when acting alone, secure a prohibitive injunction, a mandatory injunction, or a determination of damages. and their impoundment until the occurrence or defeat of the contingencies. . . ."

See id. at 2, 4 (citing *American Law Institute Restatement of the Law of Property* § 188, 189, 195). Thus, even assuming a cause of action for permissive waste is triggered under the facts of this case, this court does not have jurisdiction over such a claim.

This court does not, without express statutory authority, have jurisdiction to enter injunctive relief. *See United States v. King*, 395 U.S. 1, 4, 89 S. Ct. 1501, 23 L.Ed.2d 52 (1969); *Beck v. Secretary of Dep't of HHS*, 924 F.2d 1029, 1036 (Fed. Cir. 1991). Thus, the court does not have jurisdiction to enter an injunction with respect to the property in question. The plaintiff's reliance on injunctive relief cases to suggest that this court has jurisdiction over a permissive waste claim is misplaced. *See Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972) (in light of fiduciary duty owed the tribe, regulation allocating water supply based on a "judgement call" by the Secretary was arbitrary and capricious); and *Blue Legs v. United States*, 867 F.2d 1094 (8th Cir. 1989), *enforced sub. nom., Blue Legs v. EPA*, 732 F. Supp. 81 (D.S.D. 1990) (holding that RCRA and Snyder Act trust obligation required BIA and Indian Health Service to clean up open dumps on reservation); *See also Pit River Home Agriculture v. United States*, 30 F.3d 1088, 1098 (1994) ("5 U.S.C. § 702 waives sovereign immunity in non-monetary actions against the United States") (citing *Mitchell II*, 463 U.S. at 227 n.32, 103 S. Ct. 2961). The court, of course, does not reach whether plaintiff may, based on these precedents, maintain an action for injunctive relief in an appropriate district court based on a breach of trust claim for permissive waste.

Finally, plaintiff's contention that this court could award the Tribe $14,000,000 in money damages so that it can fulfill the government's obligation to restore the historic buildings at Fort Apache goes well beyond the established law of this court. Plaintiff is unable to point to any authority which supports its assertion that an action for permissive waste establishes a money-mandating claim, as required under the Supreme Court's opinion in *Mitchell II*. As explained above, to the extent permissive waste may constitute a breach of trust, it is a claim for injunctive relief and does not extend to a claim for immediate money damages.

In such circumstances, plaintiff's action for breach of trust based on the above-noted statutes and regulations fails to state a claim for money damages in this court. Accordingly, it must be dismissed.

5. Statute of Limitations

Defendant also argues in its motion to dismiss that this court lacks jurisdiction over plaintiff's claim because it is time barred by the six-year statute of limitations. Absent a specific statute of limitation, a suit against the United States in the Court of Federal Claims is barred unless it is brought within six years of the date upon which the claim first accrued. 28 U.S.C.

§ 2501 (1988). "A cause of action against the government 'first accrued' only when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." *Fort Indian Tribe*, 23 Cl. Ct. at 428 (quoting *Hopland Band v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)). Defendant asserts that because plaintiff "was or should have been aware" of the deteriorated state of the Fort Apache site since 1979, plaintiff's claim "accrued" beyond the six-year statute of limitations. Plaintiff argues that it was not aware of its claim until 1998. Having concluded that plaintiff has failed to state a claim for relief, the court does not reach defendant's alternative basis for dismissal.

CONCLUSION

For the reasons stated above, the court finds that plaintiff has failed to prove a fiduciary obligation on behalf of the defendant that would give rise to a claim for money damages, and therefore fails to state a claim for which relief may be granted in this court. Accordingly, defendant's motion to dismiss for failure to state a claim is **GRANTED**. The case is hereby **DISMISSED**.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 99-148 L

WHITE MOUNTAIN APACHE TRIBE

v.

THE UNITED STATES

[Filed: Nov. 19, 1999]

JUDGMENT

Pursuant to the court's Published Opinion, filed November 19, 1999, granting defendant's motion to dismiss for failure to state a claim,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

Margaret M. Earnest
Clerk of the Court

November 19, 1999 By: Lisa L. Illegible
Deputy Clerk
90-2-4-09141

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of *all plaintiffs*. Filing Fee is $105.00.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 00-5044

WHITE MOUNTAIN APACHE TRIBE,
PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on August 29, 2001.

FOR THE COURT,

/s/ JAN HORBALY
JAN HORBALY

Dated: August 22, 2001

cc: Robert C. Brauchli
Elizabeth Ann Peterson

APPENDIX E

1. 25 U.S.C. 277 states:

§ 277. Former Apache military post established as Theodore Roosevelt Indian School

The Secretary of the Interior is authorized to establish and maintain the former Fort Apache military post as an Indian boarding school for the purpose of carrying out treaty obligations, to be known as the Theodore Roosevelt Indian School: *Provided*, That the Fort Apache military post, and land appurtenant thereto, shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purposes.

2. 28 U.S.C. Section 1491(a)(1) states in part:

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

3. 28 U.S.C. Section 1505 states:

§ 1505. Indian claims

The United States Court of Federal Claims shall have jurisdiction of any claim against the United States

accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Execution orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.